Supreme Court, U.S.
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No. 05-292

In The
Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

PHILECIA BARNES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, create a cause of action for intragender discrimination based on sex stereotyping?

2) Does a transsexual have standing to bring a Title VII action for intragender discrimination based on sex stereotyping?

3) Is it reversible error for the trial court to give a mixed-motive jury instruction under 42 U.S.C. 2000e-2(m) in a Title VII pretext case?

4) Does the similarly situated comparable employee in a Title VII disparate treatment case have to work with the same decisionmaker?

5) Does a district court abuse its discretion under *Blanchard v. Bergeron* by awarding $527,888 attorneys' fees in a failure to promote case?

LIST OF PARTIES

Petitioner: City of Cincinnati, Ohio

Respondent: Philecia (a.k.a. Phillip) Barnes

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, City of Cincinnati, respectfully prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

In this alleged sex stereotyping discrimination case filed by Respondent Phillip (now Philecia) Barnes ("Barnes"), a homosexual/transsexual police officer of the City of Cincinnati, the District Court stated that the officer's "counsel were extremely creative in fashioning her case as a Title VII . . . case. . . ." App. 44. The judgment of the United States District Court, Southern District of Ohio, Western Division, was filed on August 6, 2003, after a trial before a jury. App. 31-32. Even though the District Court had held that Barnes "is a member of a protected class – men," but without any proof that Chief of Police Streicher treated Barnes differently than a similarly situated woman, the judgment awarded Barnes $150,000 in compensatory damages, $140,000 in front pay, and $30,511 in back pay. The District Court had previously denied the City's motion to dismiss, motion for summary judgment, and motion for judgment. The District Court's judgment enjoined the City from retaliating against Barnes or discriminating against Barnes "on the basis of her perceived sexual orientation, gender identity, transsexuality, or her failure to conform to sex stereotypes." *Id.* The District Court denied the City's post-trial motions for judgment and for new trial. The District Court further awarded Barnes $527,888 in attorneys' fees and $25,837 in costs. App. 48.

On March 22, 2005, a panel of the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and the award of fees and costs to Barnes. App. 1-30; 401 F.3d 729. The order of the United States Court of Appeals denying the City's Petition for Rehearing *En Banc* was issued on June 8, 2005. App. 78.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 to review the opinion of the United States Court of Appeals for the Sixth Circuit denying the City's Petition for Rehearing *En Banc* on June 8, 2005, and the opinion of the Court of Appeals issued on March 22, 2005.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

STATEMENT OF THE CASE

Barnes was a pre-operative male transsexual[1]/homosexual police officer in the Cincinnati Police Department since 1981. Barnes sometimes appeared at work

[1] A transsexual is "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex'...." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). Barnes admitted that transsexualism "is a short-hand for the psychological diagnosis of gender identity disorder."

with noticeable pink makeup, long fingernails, nail polish, arched eyebrows, etc. He often appeared as a woman off-duty. The Sixth Circuit panel noted that "Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser." The panel added: "Barnes' ambiguous sexuality and his practice of dressing as a woman outside of work were well-known within the CPD."

In 1998, Barnes passed the sergeant's promotion exam. In 1999, after the first month of Barnes' sergeant's probation period, it was clear to Barnes' supervisors that Barnes was having difficulty fulfilling the responsibilities of the sergeant's position. Barnes was provided special training and mentoring, but continued to struggle. The Chief of Police overruled the first recommendation to fail Barnes from probation. Subsequently, however, the Chief failed Barnes from sergeant's probation due to significant and uncontroverted inadequate performance. Barnes resumed his responsibilities as a police officer.

Asserting federal jurisdiction under 42 U.S.C. 2000e-5(f) and 28 U.S.C. 1343(3) and (4), Barnes filed Title VII and equal protection claims against the City of Cincinnati in federal court alleging that the Chief of Police failed him from probation due to his transsexual/homosexual characteristics. Barnes alleged in his complaint that he was "demoted because he is a transsexual who did not conform to typical heterosexual male stereotypes." He further alleged in the complaint that he "is a transsexual male" whose "sexual orientation was not heterosexual" and that he was "demoted for two reasons. One reason was because he was a transsexual.... The second reason is that [he did] not have a heterosexual orientation." Barnes later argued to the jury and publicly announced after trial that he was allegedly treated differently because he was a transsexual: "[A]

federal court jury found that the City of Cincinnati discriminated when it demoted Barnes from police sergeant because she was a transsexual." Over repeated objection by the City, the District Court instructed the jury to decide whether the City had discriminated against Barnes based on sex stereotyping.

The record established that Barnes was unable to properly perform the very significant responsibilities of police sergeant. His counsel conceded that "there really were a lot of examples of mistakes. . . . And we don't deny that." Barnes' counsel compared Barnes to another male officer who also "really screwed up on probation." Barnes himself told Chief of Police: "I just don't know if I'm cut out for this." He admitted that he needed to improve in numerous areas such as time management, computer skills, paperwork, lineups, electronic mail, grammar, sentence structure, etc. He characterized his own behavior during probation as "bizarre" and untruthful. His expert witness conceded that Barnes was "on the low end" of all probationary sergeants.

The panel acknowledged that it "may have reached a different conclusion sitting as the finder-of-fact," that "the City offers a plausible explanation of what the evidence showed at trial," and that "the City's interpretation of the evidence is itself reasonable."[2] There is no direct or circumstantial evidence in the record that the Chief of Police treated Barnes differently than a similarly situated female probationary sergeant. No police officers, men or women,

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[2] The Sixth Circuit panel did not address the City's challenge to Barnes' equal protection claim since the panel upheld the Title VII verdict. App. 18.

are permitted to wear pink makeup and pink nail polish on the job. Barnes did not plead or advance a discrimination claim that he was treated differently than a similarly situated female probationary sergeant. Nor is there even any direct or circumstantial evidence in the record that the Chief treated Barnes differently than he treated a similarly situated man. Barnes' evidence consisted of the awareness by some in the Police Department that he was a "homosexual, bisexual or cross-dresser," comments about homosexuals in the Department, a section of the City Charter prohibiting preferences based on sexual orientation (the District Court conceded that Barnes' City Charter sexual orientation evidence "tends to make it more probable that Plaintiff suffered illegal discrimination;" App. 67), the special training and mentoring provided to him, a supervisor's request that he stop wearing makeup to work and that he appear more "masculine," the promotion of another low-performing male police officer to sergeant by a different Chief of Police, and the fact that Barnes was the first police officer to fail sergeant's probation. Barnes offered no evidence that he was treated differently than a similarly situated woman.

Erroneously creating an expansive and unauthorized Title VII cause of action for alleged discrimination based on sexual stereotype, the District Court overruled significant evidentiary objections raised by the City, and denied the City's motions to dismiss, for summary judgment, for judgment as a matter of law, and for new trial. Barnes continues to serve as a police officer in the Cincinnati Police Department. Notwithstanding the City's protestations to the District Court that Barnes' transsexual and homosexual characteristics were factually irrelevant to the Chief's review of Barnes' performance as a probationary

sergeant, and the City's consistent position that, in any event, Title VII does not legally protect transsexuals and homosexuals from discrimination based on those characteristics, Barnes and his counsel successfully parlayed Barnes' transsexual and homosexual characteristics into a very large, but erroneous, judgment and a very large, but erroneous, fee award multiplied by the District Court.

A panel of the Sixth Circuit affirmed. The panel followed an earlier panel decision in *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), and erroneously concluded that " . . . Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes." App. 10. The panel erroneously affirmed jury instructions that Title VII discrimination "based on sex" includes discrimination "based on sexual stereotypes." App. 18. The Sixth Circuit erroneously expanded the scope of Title VII. Its reasoning that the statute protects one man with transsexual and homosexual characteristics from being treated differently than another man without those characteristics is flawed. Unlike the protected classes of race, religion, sex, and national origin, Title VII plainly does not define nonstereotypical[3] people as a protected class under the statute. An alleged nonstereotypical man cannot bring a Title VII claim that he was treated differently than an alleged stereotypical man.

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[3] Unlike the defined and known categories of race, religion, sex, and national origin, the concepts of "stereotypical" and "nonstereotypical" are inherently nebulous. Neither Congress nor this Court have added claims "based on stereotyping" to Title VII.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS UNDER *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989), WHETHER TITLE VII CREATES A CAUSE OF ACTION FOR INTRAGENDER DISCRIMINATION BASED ON SEX STEREOTYPING

In sharp contrast to the rulings below allowing a Title VII claim for intragender discrimination based on sex stereotyping, in 1989 Justices Kennedy and Scalia, and Chief Justice Rehnquist, clearly explained that "Title VII creates no independent cause of action for sex stereotyping." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 294 (1989) (dissenting opinion) (a case comparing one female applicant for partner with 87 male applicants for partner). Even the plurality emphasized: "Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer relied on her gender in making its decision." *Id.*, p. 251. The plurality articulated the catch 22 reason why the male applicants could not be treated more favorably than the female applicant: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.* Barnes was not placed in an impermissible catch 22. The Cincinnati Police Department does not allow any officers, male or female, to wear pink makeup and pink nail polish. The Department does not require that its sergeants behave in a way objectionable for men but permitted for women.

Seventh Circuit Judge Posner more recently concurred: "'Sex stereotyping' should not be regarded as a form of sex discrimination. . . ." *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1068 (7th Cir. 2003). Judge Posner further emphasized that "the case law has gone off the tracks in the matter of 'sex stereotyping'. . . ." 332 F.3d at 1066. He characterized as an "absurd conclusion," "a fantasy," and "an extravagant fiction" the idea that the law could "disentangle the motives for disliking the nonstereotypical man or woman. . . ." *Id.*, p. 1067.

Recognizing that gender-based discrimination in the workplace means that males and females are treated differently, this Court upheld the Family and Medical Leave Act. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003). In another context, the Court established that "stereotyping" relates to "the relative abilities of men and women." *J.E.B. v. Alabama*, 511 U.S. 127, 130 (1994).

It is undisputed that Title VII's proscription against discrimination based on sex does not protect an individual from discrimination based on sexual orientation. Discrimination based on transsexual characteristics similarly is not proscribed by the statute. Barnes did not claim he was treated differently than a similarly situated woman. Barnes' claim that another man with a different sexual orientation, or without transsexual characteristics, was treated differently by a different Chief of Police widely misses the Title VII mark. Neither Barnes' claim that he was treated differently than another man because Barnes was homosexual, or Barnes' claim that he was treated differently than another man because he was transsexual, falls within the scope of Title VII's intent to prevent disparate treatment of similarly situated men and women.

The Sixth Circuit erred by affirming the judgment of the District Court.

The Second Circuit recognized the problematic nature of claims for discrimination based on sex stereotyping brought by homosexual employees. In *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2nd Cir. 2005), the Court ruled against the homosexual employee who, like Barnes, had filed claims for sex, sexual orientation, and sex stereotyping discrimination. The Court observed the "somewhat protean quality" of the plaintiff's claims and that they were "significantly conflated." *Id.*, p. 217. The Court recognized that "[w]hen utilized by an avowedly homosexual plaintiff . . . gender stereotyping claims can easily present problems for an adjudicator. . . . [A] gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII'. . . . [D]istrict courts in this Circuit have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes." *Id.*, pp. 218-19.

The Seventh Circuit held that Title VII does not protect transsexuals from discrimination based on their transsexual characteristics. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084, 1086 (7th Cir. 1985). The Eighth Circuit agrees. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982). Other courts similarly held that Title VII and equivalent state laws do not protect transsexuals and homosexuals from discrimination on that basis. *Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058 (S.D. Ind. 2003); *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La. 2002); *Rentos v. Oce-Office Systems*, 1996 WL 737215 (S.D.N.Y. 1996); *Dobre v.*

National R.R. Passenger Corp., 850 F. Supp. 284 (E.D.Pa. 1993); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994); *James v. Ranch Mart Hardware, Inc.*, 881 F.Supp. 478 (D.Kansas 1995); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989). Homosexuals are not a protected class under Title VII. *Ruth v. Children's Medical Center*, 940 F.2d 662 (6th Cir. 1991).

One court was absolutely clear:

> By virtue of the many courts which have struggled for two decades with the issue of whether Title VII, in prohibiting discrimination on the basis of "sex", also proscribes discrimination on the basis of sexual identity disorders, sexual preference, orientation, or status, Congress has had an open invitation to clarify its intentions. The repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder. In reaching this decision, this Court defers to Congress who, as the author of Title VII, has defined the scope of its protection. Neither Title VII nor the United States Supreme Court's decision in *Price Waterhouse* affords plaintiff the protection that he seeks.

Oiler v. Winn-Dixie Louisiana, Inc., 2002 WL 31098541, *6 (E.D. La. 2002)

On the other hand, like the Sixth Circuit, the Ninth Circuit has also permitted Title VII claims for discrimination based on sex stereotype. *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001).

As a result of this Court's comment in *Price Waterhouse v. Hopkins*, *supra*, that evidence of sex stereotyping could be relevant to prove that a woman was treated differently than similarly situated men, the federal courts have issued conflicting rulings whether to expand Title VII to include claims that an individual was treated differently than another person of the same sex for reasons of alleged stereotyping. The case at bar is an opportunity for this Court to clearly establish that there is no Title VII claim for discrimination based on sex stereotyping.

II. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS WHETHER A TRANSSEXUAL MAY BRING A TITLE VII CAUSE OF ACTION FOR INTRAGENDER DISCRIMINATION BASED ON SEX STEREOTYPING

Even assuming *arguendo* that some plaintiffs may bring a Title VII cause of action for discrimination based on sex stereotyping, a transsexual does not have standing to bring that claim. By definition, a transsexual is "one who has '[a] rare psychiatric disorder in which the person feels persistently uncomfortable about his or her anatomical sex'. . . ." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). A *male* transsexual could bring a Title VII claim that he was treated differently than a similarly situated *female* transsexual. A male transsexual like Barnes, however, cannot claim discrimination based on sex under Title VII by alleging a male who is not transsexual was treated differently.

Just as a male homosexual does not have standing, based on his sexual orientation, to bring a Title VII claim that he was treated differently than another male, so a male transsexual does not have standing to claim, based

on his transsexual characteristics, that he was treated differently than another male. The panel below considered "transsexual" a mere "label." App. 10. The panel held that when a transsexual employee alleges that his failure to conform to sex stereotypes concerning how a man should look and behave motivated his employer, even without proof that a similarly situated woman was treated differently, the transsexual employee states a claim for relief pursuant to Title VII's prohibition of discrimination based on sex. *Id.*

Homosexual appearance or conduct does not confer standing to claim Title VII discrimination based on sex. Transsexual appearance or conduct also does not confer standing to claim Title VII discrimination based on sex. For the reasons described in the preceding section, Congress has not conferred standing on homosexuals or transsexuals to claim that they were discriminated against based on their homosexual or transsexual characteristics.

III. THIS COURT'S DECISION IN *DESERT PALACE, INC. V. COSTA* MISLED THE SIXTH CIRCUIT INTO ERRONEOUSLY AFFIRMING TITLE VII MIXED-MOTIVE JURY INSTRUCTIONS IN THIS TITLE VII PRETEXT CASE AND ELIMINATING THE PLAINTIFF'S PROPER BURDEN OF PROOF

The case at bar is a pretext case. The City consistently affirmed that Barnes failed probation because of his inadequate performance. The City consistently denied that Barnes failed probation because of his homosexual or transsexual characteristics. Barnes admitted that "[t]he City denied that discrimination had anything to do with

the demotion. . . ." An employee has the burden of proof that the employer's asserted justification for the employment action is pretextual. *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 515 (6th Cir. 2003); *Brown v. Packaging Corporation of America*, 338 F.3d 586, 595, n. 1 (6th Cir. 2003).[4]

Conceding that the jury instructions did not require that the plaintiff prove pretext, and citing this Court's decision in a mixed-motive case, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003), the panel affirmed the district court's mixed-motive jury instructions. App. 15-17. *Desert Palace* was a sex discrimination case evaluating whether a woman was treated differently than similarly situated men. This Court expressly stated that the case did not require it to determine when, if ever, the Title VII statute in issue in that case applied outside the mixed-motive context. 539 U.S. at 91, n. 1. The Sixth Circuit panel nevertheless held that a jury instruction did not have to "precisely follow the legal niceties of *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 79 (1973)]. . . ." and that a "district court is not bound by the *McDonnell Douglas* analysis when giving jury instructions." App. 16-17. The panel erroneously concluded that "it is clear that the mixed-motive instruction was proper under *Desert Palace*."

Barnes admitted that he had serious deficiencies performing the responsibilities of sergeant, he compared himself to another male sergeant who also "really screwed up on probation," and his own expert witness acknowledged

[4] It makes no sense for an employer denying the existence of the alleged discrimination to have to prove that it would have made the same decision in the absence of the alleged discrimination.

that Barnes was at the low end for probationary sergeants. There are only three kinds of evidence that Barnes could have used to demonstrate pretext. *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000). Barnes offered none of these kinds of evidence. Moreover, Barnes offered none of the kinds of evidence cited in *Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579 (6th Cir. 2002) to show that an employer's proferred reason for firing an employee was false. Unlike the plaintiff in *Wexler v. White's Fine Furniture*, 317 F.3d 564 (6th Cir. 2003) (*en banc*), Barnes did not produce evidence that the Chief of Police fabricated Barnes' weaknesses as sergeant.

The Sixth Circuit panel, therefore, erred by holding that "[t]he jury was free to believe or disbelieve the City's explanation that Barnes was demoted because he was not qualified to fill the role of sergeant." Barnes' concession of deficiencies precluded the jury from disbelieving the City's legitimate reason for failing him from probation. There was no sufficient ground in the case at bar for rejecting the City's legitimate reason. In *Moorer v. Baptist Memorial Health Care System*, 398 F.3d 469, 481 (6th Cir. 2005), the Sixth Circuit affirmed the district court's conclusion that the employer had "concocted" pretextual justifications for the employee's termination. By contrast, in the case at bar, Barnes' deficiencies were uncontroverted.

Employers are prejudiced when mixed-motive jury instructions are allowed in a pretext case because the employee is relieved of the burden of proving that the employer's legitimate reason for the employment decision was pretextual. Barnes conceded in response to the City's motion for summary judgment that since the Chief of Police offered legitimate reasons for failing Barnes from probation, "*the burden shifts back to the plaintiff to prove*

that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination." (emphasis added). A *prima facie* case alone is not sufficient to conclude that an employer unlawfully discriminated. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

But for the misleading jury instructions, no rational factfinder could reject the admitted legitimate reasons for failing Barnes from probation. The panel erred by relieving Barnes of his proper burden to prove that the legitimate reason for failing him from probation was pretextual.

IV. THE SIXTH CIRCUIT ERRONEOUSLY ELIMINATED THE TITLE VII REQUIREMENT THAT A PLAINTIFF PROVE THAT A SIMILARLY SITUATED EMPLOYEE OUTSIDE HIS PROTECTED CLASS WORKED WITH THE SAME DECISIONMAKER

A plaintiff does not prove a *prima facie* case if he does not establish that he was treated differently than a similarly situated employee outside his protected class. *Noble v. Brinker International, Inc.*, 391 F.3d 715 (6th Cir. 2004). Not only did Barnes use another male as the purported similarly situated employee outside Barnes' protected class of men, the other employee did not work with the same decisionmaker. A plaintiff bringing a Title VII claim must demonstrate that "other employees of similar qualifications who were not members of the protected class received promotions." This requirement includes that the other similarly situated employees worked with the same supervisor. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). Barnes' asserted similarly

situated employee was another male probationary sergeant promoted in a different year by a different Chief of Police. The panel erred to the prejudice of employers by eliminating a plaintiff's proper *prima facie* burden of pleading and proof in an alleged disparate treatment case.

V. AN ATTORNEY FEE AWARD OF $527,888 IN A FAILURE TO PROMOTE CASE IS AN ABUSE OF DISCRETION UNDER *BLANCHARD V. BERGERON*

Barnes' claim in this case relates to the City's decision to fail him from sergeant's probation. He was, and remains, a police officer in the Cincinnati Police Department. Barnes conceded significant deficiencies in his performance as probationary sergeant. The Sixth Circuit panel expressly acknowledged that the City's interpretation of the evidence was plausible and reasonable. Nevertheless, citing the District Court's "wide discretion" (App. 30), the Sixth Circuit panel affirmed the District Court's award of fees to Barnes' counsel in the amount of $527,888.

The District Court abused its discretion under *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), by concurrently awarding Barnes' counsel high hourly rates ($350/hour and $250/hour respectively) in excess of their rates at the time incurred, allowing recovery for time spent on claims voluntarily dismissed by Barnes (Barnes dismissed a sexual harassment claim just prior to trial),[5] and by then

[5] The panel mistakenly suggested that the "district court found that Barnes's attorney fees should not be reduced in this case based on Barnes litigating unsuccessful claims, because the claims were not

(Continued on following page)

multiplying the product of the high rate and high excess hours by 1.75. App. 26-30. The cumulative and compounded effect of all three enhancements resulted in the unreasonable fee calculation of $527,888. It is one thing for the federal civil rights laws to justifiably create an incentive for reasonable fee recovery by successful plaintiffs. It is something else for the courts to allow an unreasonable windfall profit to plaintiffs' lawyers by calculating the fee amount by using high current rates for all hours, adding hours for time spent on voluntarily dismissed claims, and applying a 1.75 multiplier. The panel even cited a similar case only awarding a much lower ten percent multiplier in an employment discrimination case "due to the ground breaking nature of case." App. 29, citing *Quinn v. Nassau County Police Dept.*, 75 F. Supp. 2d 74 (E.D.N.Y. 1999). The District Court abused its discretion by inflating the calculation of fees, and the Sixth Circuit panel erred by affirming that abuse.

CONCLUSION

Police Officer Barnes failed sergeant's probation because he was unable to properly perform the responsibilities of the position. The Court should grant this Petition for Writ of Certiorari in order to establish that Title VII's proscription of discrimination "based on sex" does not include intragender discrimination "based on sex stereotyping." Title VII does not protect a police officer like Barnes whose claims are based upon his transsexual and

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separable." App. 27. In fact, Barnes voluntarily dismissed a sexual harassment claim prior to trial.

homosexual characteristics. The decision below creating a new and vague cause of action for employment discrimination imposes enormous uncertainty on employers. Assuming *arguendo* that Title VII authorizes a cause of action for discrimination based on sex stereotyping, an employee's homosexual and transsexual characteristics cannot be the basis for an adverse Title VII verdict against an employer. The Court should further rectify the confusion engendered by *Desert Palace, Inc. v. Costa*, and establish that giving mixed-motive jury instructions in a pretext case unlawfully removes the proper burden of proof from a plaintiff. The Court should clarify that the similarly situated employee in a Title VII disparate treatment case had to work with the same decisionmaker.

Respectfully submitted,

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401 F.3d 729

United States Court of Appeals,
Sixth Circuit.

Philecia BARNES, Plaintiff-Appellee,
v.
CITY OF CINCINNATI, Defendant-Appellant.
Nos. 03-4110, 04-3320.

Argued: Dec. 3, 2004.
Decided and Filed: March 22, 2005.
Rehearing En Banc Denied June 8, 2005.

ARGUED: Richard Ganulin, City Solicitor's Office, Cincinnati, Ohio, for Appellant. Alphonse A. Gerhardstein, Laufman & Gerhardstein, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Richard Ganulin, Augustine Giglio, City Solicitor's Office, Cincinnati, Ohio, for Appellant. Alphonse A. Gerhardstein, Jennifer L. Branch, Laufman & Gerhardstein, Cincinnati, Ohio, for Appellee.

Before: GILMAN and SUTTON, Circuit Judges; McKEAGUE, District Judge.*

OPINION

MCKEAGUE, District Judge.

Phillip (now Philecia) Barnes ("Barnes") was living as a pre-operative male-to-female transsexual in 1999 when he failed the probationary period required to become a police sergeant in the Cincinnati Police Department ("CPD"). Barnes passed the sergeants exam, but failed the probationary period after he was subjected to a rigorous

* The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

training program. Barnes brought suit against the City of Cincinnati in the United States District Court for the Southern District of Ohio, claiming that his failure of probation was due to illegal sex discrimination based on his failure to conform to sex stereotypes. The City argued that Barnes's failure was due to poor performance during his probationary period. The City filed pre-trial motions to dismiss and for summary judgment, both of which were denied. A jury returned a verdict in Barnes's favor in the amount of $320,511. The City filed a motion for Judgment as a matter of law or for a new trial, both of which were also denied. The district court awarded Barnes $527,888 in attorneys fees and $25,837 in costs. The City appealed the verdict on thirteen separate grounds and appealed the district court's award of attorneys fees. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. FACTS

Barnes started his career with the CPD in 1981 as a police officer. Barnes passed a promotional test to become a sergeant on July 13, 1998. Barnes placed eighteenth out of 105 officers who sat for the exam. At the time of his promotion, Barnes was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty. Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser. No other male sergeant was known to be gay or have a feminine appearance. The Cincinnati vice squad photographed Barnes at night.

Following his promotion, Barnes was assigned to District One for his probationary period. The purpose of a

sergeant's probationary period is to allow superior officers to observe the individual to determine whether the person should remain in the position. Eighteen standard traits are used for rating a probationary sergeant, with "judgment" being the most important category. Rating scales are used to measure performance and are described throughout the CPD's procedures. The City presented evidence at trial that sergeant is the most important rank in the organization and the City makes no exceptions for anyone. Even exceptionally good police officers may not possess the skills required to be a good supervisor. Barnes admitted the transition from officer to sergeant was more difficult than he expected. Barnes also stated there was a difference between an officer's and a sergeant's responsibilities and there were areas in which he needed to improve throughout the probationary period.

One of Barnes's alleged weaknesses was lack of "command presence." According to Sergeant Shearer, command presence means that an individual "projects a certain image of confidence." Several other officers testified that Barnes lacked command presence, which, according to them, meant that he did not have the respect of his subordinates. Barnes's expert testified that employers who use subjective factors, like "command presence" to evaluate an employee are engaging in stereotyping. Nearly every evaluator who spoke to Barnes's "command presence" defined the term differently.

Barnes was assigned to Lieutenant ("Lt.") Wilger when he arrived at District One. Lt. Wilger openly spoke about the number of lesbians in the CPD and did not believe he violated any policy by speaking about the sexual orientation of female police officers while on duty. Lt. Ross testified that when Barnes arrived at District One for his

probationary period, people did not take him as seriously as they should. Barnes was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions. Within a month of Barnes's promotion, Lt. Wilger reported to the head of District One, Captain ("Capt.") Demasi, that Barnes was having trouble fulfilling his duties. Lt. Wilger noted that Barnes had trouble preparing documents, exercising proper judgment in the field and completing assignments on time. After the meeting, Barnes was placed in a new training program.

The new training program required Barnes's superiors to evaluate him on a daily basis over a three month period. A special six-page form was created to evaluate Barnes. The program was designed and approved by Chief Streicher, the CPD chief. The program required seven other sergeants to rate Barnes on a daily basis. Barnes was rated in each of the standard eighteen categories on a scale of zero to twenty-five. Barnes was also told not go into the field alone, was required to wear a microphone at all times and ride in a car with a video camera during the last weeks of his probation. No other sergeants were evaluated in this manner. Barnes claimed that this experience was demeaning and it made those around him think that he was incompetent and ignorant. Barnes did admit, however, that he did not "want to speculate" on the issue of whether he was singled out based on his transsexual characteristics. Sergeant Ford testified that "[t]he purpose of the program was to scrutinize him and to document every mistake that he made so that he could be failed on probation."

Nearly a month into Barnes's evaluation program, he was stressed and "flustered" from his assignment to the

program. Barnes was referred to CPD psychologist, Dr. James Daum, who recommended that Barnes receive counseling. Dr. Daum sent his report to Chief Streicher because he wanted the police division to know that Barnes needed help. Barnes claimed that many of his problems during probation were related to his elevated stress level, which would not have occurred but for his superiors singling him out in the manner they did.

Barnes received twenty-two evaluations from five different sergeants between February 21 and April 14, 1999. On April 15, Capt. Demasi recommended to Chief Streicher that Barnes fail probation because he had shown little improvement in his performance and because Barnes had violated CPD rules and procedures. Chief Streicher denied Capt. Demasi's recommendation. Barnes was instructed to choose a mentor and he chose Sergeant Hoffbauer. Sergeant Hoffbauer was Barnes's last evaluator, and evaluated Barnes between April 20 and May 18. Hoffbauer initially gave Barnes mediocre evaluations, but gave Barnes scores of zero in some categories by the middle of May.

In June, Colonel ("Col.") Twitty instructed Capt. Demasi to submit a second report recommending that Barnes fail probation. Capt. Demasi reiterated his concern over Barnes's lack of improvement and detailed several instances of dishonesty. Capt. Demasi also noted two instances where Barnes failed to comply with grooming and uniform standards, a day where Barnes committed multiple radio infractions and Barnes's failure to display appropriate "command presence." Chief Streicher relied on Col. Twitty's report and approved Barnes's failure of probation on June 22, 1999.

Chief Streicher testified at trial that Barnes had a lack of command presence and that he flunked Barnes from probation. Sergeant Ford, one of Barnes's reviewing sergeants, testified that Barnes was improving over the course of the training and that Barnes was placed in the special program to "target him for failure."

The City agrees that Col. Twitty told Barnes he did not appear to be "masculine," and that he needed to stop wearing makeup and act more masculine prior to Barnes's promotion. Col. Twitty stated the objective of such statements was to correct Barnes's "grooming deficiencies." Col. Twitty also stated that the decision to fail Barnes from probation had nothing to do with Barnes's transsexual characteristics. However, Sergeant Ford warned Barnes that he heard rumors that Barnes was going to fail probation because Barnes had not been acting masculine enough.

Barnes's expert, industrial psychologist Dr. Cranny, found that Barnes met the general standard identified for passing sergeant's probation, as his scores were above the minimum required range for passing. Barnes's expert testified that he was unable to understand how Barnes could have failed probation. Barnes's scores on the sergeant evaluation tests were higher than at least one other probationary sergeant. Barnes was the only person to be put in a Sergeant Field Training Program and the only one to fail probation between 1993 and 2000.

Barnes challenged his demotion from sergeant under Title VII and the Equal Protection Clause. The City filed a motion to dismiss and a motion for summary judgment, which were both denied by the district court. The City argued that a legitimate reason, poor performance, justified the demotion in this case. The claims were submitted

to a jury, which returned a verdict in Barnes's favor. The jury awarded $150,000 in compensatory damages, $140,000 in front pay and $30,511 in back pay. The City moved for judgment as a matter of law, which was also rejected by the district court. The district court awarded Barnes $527,888 in attorneys fees and $25,837 in costs on February 27, 2004. The City filed this timely appeal alleging thirteen claims of error at trial and appealing the district court's award of attorneys fees.

II. ANALYSIS

A. Barnes produced sufficient evidence at trial to establish a claim for sex discrimination under Title VII.

The City states, without making it entirely clear which decision of the district court it is appealing, that Barnes failed to make out a prima facie case of sex discrimination under Title VII. In cases where an appellant made a Rule 56 motion for summary judgment that was denied, reiterated those same arguments in a Rule 50(a) motion at the close of evidence that was also denied, lost in front of a jury, and then renewed its arguments in a rejected Rule 50(b) motion after the entry of judgment, we will review only the denial of the Rule 50(b) motion. *K & T Enters. v. Zurich Ins., Co.*, 97 F.3d 171, 174 (6th Cir.1996).

We review a district court's denial of a motion for judgment as a matter of law or a renewed motion for judgment as a matter of law *de novo*. *United States v. Alpine Indus., Inc.*, 352 F.3d 1017, 1022 (6th Cir.2003). Judgment as a matter of law may only be granted if, when viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences,

there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001); *see also Williams v. Nashville Network*, 132 F.3d 1123, 1130-31 (6th Cir.1997).

The City argues on appeal that Barnes did not plead or prove a prima facie case of sex discrimination under Title VII. The City also argues that the district court erred by not granting its motion for judgment as a matter of law and by denying its motions for summary judgment and to dismiss.[1] For the reasons stated below, we find that the City's claim that Barnes failed to plead and prove a prima facie case lacks merit and hold that the district court did not err when it denied the City judgment as a matter of law.

When reviewing the facts of a discrimination claim after there has been a full trial on the merits, we must focus on the ultimate question of discrimination rather than on whether a plaintiff made out a prima facie case. *See Noble v. Brinker Intern., Inc.*, 391 F.3d 715, 724-26 (6th Cir.2004) (noting that when the case proceeds to a full trial on the merits, the district court is "in a position to decide the ultimate factual issue in the case, that is,

[1] As noted above, the City appeals the denial of its motions for summary judgment and to dismiss. However, once there has been a jury verdict adverse to the moving party, the denial of such motions is not properly reviewable on an appeal from the final judgment entered after trial. *See Adam v. J.B. Hunt Transp. Inc.*, 130 F.3d 219, 231 (6th Cir.1997); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir.1990); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358 (9th Cir.1987). We therefore decline to review the district court's denial of the City's motion for summary judgment and to dismiss.

whether the defendant intentionally discriminated against the plaintiff)." Thus, "the proper inquiry following the presentation of all evidence in a Title VII case is whether plaintiff has proven its case by a preponderance [of the evidence.]" *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir.1997). Nonetheless, the evidentiary underpinnings of a plaintiff's prima facie case are not irrelevant or insulated from our examination to aid our determination whether the evidence is sufficient to support a finding of intentional discrimination. *Noble*, 391 F.3d at 725.

In order to establish a claim of sex discrimination, a plaintiff must demonstrate that (1) he is a member of a protected class; (2) he applied and was qualified for a promotion; (3) he was considered for and denied the promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In this case, Barnes claims that the City intentionally discriminated against him because of his failure to conform to sex stereotypes. The City claims that Barnes failed to establish the first and the fourth elements of a prima facie case, because he was not a member of a protected class and he failed to identify a similarly situated employee who passed probation.

Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir.2004), instructs that the City's claim that Barnes was not a member of a protected class lacks merit. In *Smith*, this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protections, stating:

> Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

Id. at 575. By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination. *Id.* at 573, 575. Following the holding in *Smith*, Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.

Next, the City's claim that Barnes failed to establish a prima facie case because he did not identify a similarly situated employee who was not a member of Barnes's protected class who passed probation also lacks merit. Barnes need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly situated." Rather, Barnes and the employee with whom he seeks to compare himself must be similar in "all of the relevant aspects." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir.1998) (noting that inflexible criteria for establishing the similarly-situated requirement would mean that "a plaintiff whose job responsibilities are unique to his or her position will never successfully establish a prima facie case (absent direct evidence of discrimination)"). An exact correlation with the comparable employee is not required. *Id.* Barnes presented evidence

that he was the only police sergeant to fail probation between 1993 and 2000 and that one other sergeant, who had lower probationary scores than Barnes and was not a member of Barnes's protected class, passed probation.[2] Following the holding in *Ercegovich*, Barnes also established the fourth element of a prima facie case for sex discrimination.

The ultimate question in this case is whether the City demoted Barnes or discriminated against Barnes because of his failure to conform to sex stereotypes. It is not sufficient for a jury to merely disbelieve the reason offered by the defendant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The jury must believe the reason offered by the plaintiff, that is, it must believe that the plaintiff was the victim of intentional discrimination. *Id.* at 519, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407. The Court stated that "proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 517, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407.

There is evidence in the record to support Barnes's claims, and therefore, the district court did not err in denying the City judgment as a matter of law, because a reasonable jury could find in favor of Barnes. The evidence Barnes produced at trial showed: (1) Barnes's performance

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[2] We do not reexamine the issue of whether Barnes established a *prima facie* case or whether the district court should have dismissed the case for failure to plead a prima facie case. *Noble*, at 725. Instead, for the reasons stated above, we find that the evidence supporting the elements of a prima facie case tends to show the City unlawfully discriminated against Barnes.

ratings as a probationary sergeant, though low, surpassed those of at least one other probationary sergeant who passed probation; (2) No other probationary sergeant had ever failed probation; (3) Barnes's ambiguous sexuality and his practice of dressing as a woman outside of work were well-known within the CPD; (4) One of Barnes's supervisors told him he was not sufficiently masculine, and numerous supervisors and peers criticized him for lacking a quality known as "command presence;" (5) Two months into his probation, Barnes was placed in a "sergeant field training program" under the constant scrutiny of other sergeants who recorded every mistake he made; (6) The intensive oversight of the program caused Barnes significant stress; (7) The stress caused Barnes to commit mistakes in fulfilling his duties as a sergeant; (8) Barnes's dishonesty, including lying to a supervisor, stemmed from his fear of failing under the intense scrutiny of the training program; (9) No probationary sergeant before or since Barnes has been placed in a program similar to Barnes's; (10) Barnes was told by one of his superiors that he was going to fail probation for not acting masculine enough.

The jury was free to believe or disbelieve the City's explanation that Barnes was demoted because he was not qualified to fill the role of sergeant. Disbelief of a defendant's explanation is not enough to support plaintiff's jury verdict. It is clear, however, that Barnes produced evidence at trial that tended to show that the City's proffered reason for demoting Barnes was false and that the real reason for his demotion was unlawful discrimination. *See Hicks,* 509 U.S. at 519, 113 S.Ct. 2742, 125 L.Ed.2d 407. While we may have reached a different conclusion sitting as the finder-of-fact, it is not our role to substitute our judgment for that of the jury. *Douglass v. Eaton Corp.*, 956

F.2d 1339, 1343 (6th Cir.1992). Rather, we are left to examine whether Barnes produced sufficient evidence at trial to carry his burden of proof. We are convinced that he properly pled a prima facie case under *Smith*, 378 F.3d at 568, and that he produced sufficient evidence at trial for a reasonable jury to find that the City intentionally discriminated against him. *Noble*, 391 F.3d 715, 724-26. We therefore conclude that the district court did not err in denying the City's motion for judgment as a matter of law.

B. Barnes had standing to bring his claims against the City.

The City argues in its brief that Barnes did not have standing to bring a Title VII or equal protection claim against the City because he was not a member of a protected class, and because he conceded that the City had legitimate motives to fail him from probation. The City also argues that Barnes did not have standing to seek injunctive relief. The issue of standing is reviewed de novo. *Lynch v. Leis*, 382 F.3d 642, 645 (6th Cir.2004). The standard of review for the grant of an injunction is abuse of discretion. *United States v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir.2002).

To establish Article III standing, a litigant must show (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury will likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For purposes of an Article III standing analysis, an injury in fact means "an invasion of a legally protected interest[.]" *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. City of*

Jacksonville, 508 U.S. 656, 663, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). Generally, an equal protection claim requires a plaintiff to allege that a defendant has intentionally discriminated against him or her because the individual is part of a vulnerable minority class of protected individuals. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 256, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

The City's argument that Barnes lacked standing because he was not a member of a protected class fails, as Barnes *is* a member of a protected class as defined in Title VII. *Smith*, 378 F.3d at 575. The City's claim that Barnes did not have standing to bring an equal protection claim based on his status as a transsexual also fails, as Barnes is a member of a protected class – whether as a man or a woman. *See id.; see also Village of Arlington Heights*, 429 U.S. at 256, 97 S.Ct. 555, 50 L.Ed.2d 450. The City's final standing argument, that the district court erred in granting an injunction enjoining the City from further discrimination against Barnes is equally meritless. The district court explicitly found substantial reasons existed in favor of granting an injunction, and this Court will not overturn the district court's decision to grant an injunction, as there is no indication that the district court committed a clear error in judgment. *Miami Univ.*, 294 F.3d at 806.

C. The district court did not commit reversible error in instructing the jury.

Claims of error in jury instructions require the instructions to be reviewed as a whole in order to determine whether they adequately informed the jury of the relevant considerations and provided a basis in law for aiding the

jury in reaching its decision. *Beck v. Haik*, 377 F.3d 624, 636 (6th Cir.2004) (citing *O-So Detroit, Inc. v. Home Ins. Co.*, 973 F.2d 498, 502 (6th Cir.1992)). "This court may reverse a judgment on the basis of improper jury instructions only if the instructions, when viewed as a whole, were confusing, misleading and prejudicial." *United States v. Wells*, 211 F.3d 988, 1002 (6th Cir.2000); *see also Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir.2000) (stating that "[w]e will not reverse a decision on the basis of an erroneous jury instruction where the error is harmless").

1. The district court's mixed-motive instruction was a correct statement of the law and did not confuse or mislead the jury.

The City argues that the district court erred in instructing the jury on mixed-motive. The City argued at length in its brief that the trial court erred by not requiring Barnes to prove that Chief Streicher's legitimate reasons for failing Barnes from probation were a pretext for unlawful discrimination. The City argued that this is a pretext case and under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the burden of proof shifted back to Barnes to show pretext after the City produced evidence of its allegedly legitimate motive to demote Barnes.

In this case, the district court instructed the jury as follows.

> Your verdict will be for plaintiff if you find that plaintiff demonstrated by a preponderance of the evidence that plaintiff's failure to conform to sex stereotypes was a motivating factor in

> defendant's decision to demote plaintiff, even if other factors . . . also motivated defendant's decision. However, if you find that defendant's treatment of plaintiff was motivated by both plaintiff's failure to conform to sex stereotypes and lawful reasons, you must decide whether plaintiff is entitled to damages. Plaintiff is entitled to damages unless defendant proves by a preponderance of the evidence that defendant would have demoted plaintiff even if plaintiff's failure to conform to sex stereotypes had played no role in the decision. Remember that plaintiff is not obligated to show that defendant's legitimate reasons played no role in the decision to demote plaintiff, nor does plaintiff need to show that the prohibited factor was the sole or principal reason or the true reason.

In order for an instruction to be proper under 42 U.S.C. § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (citing 42 U.S.C. § 2000e-2(m)). In *Desert Palace*, the Court upheld a district court's decision to instruct the jury in a Title VII sex discrimination case, where the district court used the same language as the district court used in this case. *Desert Palace*, 539 U.S. at 96-97, 123 S.Ct. 2148, 156 L.Ed.2d 84.

A jury instruction will not automatically be erroneous simply because it does not precisely follow the legal niceties of *McDonnell Douglas*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207

(1981). *See Brown v. Packaging Corp. of Am.*, 338 F.3d 586, 591 (6th Cir.2003); *see also Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir.2003) (stating that criticism of an employee's performance, even if true, which is linked to stereotypes associated with a plaintiff's membership in a protected class is therefore squarely within the rubric of a mixed-motive analysis).

In this case, Barnes presented sufficient evidence for a reasonable jury to conclude that sex was a motivating factor for the City's employment decision. *See § II.A.1, supra.* A district court is not bound by the *McDonnell Douglas* analysis when giving jury instructions. *Brown*, 338 F.3d at 591. As the district court did in this case, courts may give mixed-motive jury instructions where the plaintiff has presented enough evidence for a reasonable jury to find by a preponderance of the evidence that sex was a motivating factor in the decision to demote plaintiff. *Desert Palace*, 539 U.S. at 96-97, 123 S.Ct. 2148, 156 L.Ed.2d 84. The district court instructed the jury using a mixed motive instruction that tracked the language in *Desert Palace*. After reviewing the mixed-motive instruction and the jury instructions as a whole, it is clear that the mixed-motive instruction was proper under *Desert Palace*. Accordingly, we cannot say that the instructions were confusing, misleading and prejudicial and we hold that the district court did not err by giving a mixed-motive instruction to the jury.

2. We need not address arguments related to the district court's Equal Protection Clause jury instructions.

The City next argues the district court erred by "overbroadly instructing the jury" that the Equal Protection

Clause (EPC) "prohibits discrimination against public employees on the basis of an employee's perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes." The City also argues the district court diluted Barnes's burden of proof by instructing the jury that it could "not consider whether plaintiff's own actions contributed to . . . [his] injury." As the City conceded at oral argument, however, we need not reach these challenges if we uphold the Title VII verdict. As a result, we will not address these arguments.

3. The district court did not err by instructing the jury it could find discrimination based on "sexual stereotype."

The City argues that it was improper, under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), to instruct the jury that discrimination "based on sex" includes discrimination "based on sexual stereotypes." A claim for sex discrimination under Title VII, however, can properly lie where the claim is based on "sexual stereotypes." The district court therefore did not err when it instructed the jury that it could find discrimination based on "sexual stereotypes." *See Smith*, 378 F.3d 566.

D. The district court did not commit reversible error in its evidentiary rulings.

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Cline*, 362 F.3d 343, 348 (6th Cir.2004). An abuse of discretion occurs when the district court "relies on clearly erroneous findings of fact, . . . improperly applies the law, . . . or . . .

employs an erroneous legal standard." *Id.; see also United States v. Kingsley,* 241 F.3d 828, 835 n. 12 (6th Cir.2001) (abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made). *United States v. Haywood,* 280 F.3d 715, 719-20 (6th Cir.2002) (holding that a district court's decision to admit evidence under Rule 404(b) is reviewed under an abuse of discretion standard).

1. The district court did not err in admitting a post-probation statement and in allowing Barnes to argue about such statement.

The City argues the district court erred by denying the City's motion *in limine* as to statements allegedly made by Lt. Wilger regarding lesbians in the City's police department and the use of the word "fag." The City also argues the district court erred by allowing Barnes to make a misleading argument to the jury, based on these statements.

There is nothing in the record that gives this Court a firm conviction that a mistake has been made. The district court did not make any erroneous findings of fact, improperly apply the law or use an erroneous legal standard. *Cline,* 362 F.3d at 348. Lt. Wilger's statement could certainly be construed as probative of his intent to ensure that Barnes was demoted. Indeed, the district court ruled that the statement reflected Lt. Wilger's intent, and was therefore admissible under Fed.R.Evid. 404(b). Without citing Fed.R.Evid. 403, the City argues in its brief that the statement was "highly prejudicial." While it is clear that the City would have preferred that the jury not hear this statement at trial, the evidence of intent was admissible under 404(b), and the City has failed to show that it was

irrelevant or overly prejudicial under Fed.R.Evid. 403.[3] Therefore, the district court did not abuse its discretion in allowing the testimony.

2. The district court did not commit reversible error by admitting testimony regarding Sergeant Ford's statements.

The City argues the district court erred in allowing Barnes to testify regarding an alleged out of court declaration by a sergeant about alleged rumors. The City argues that the statement constituted double hearsay and it was highly prejudicial to allow Barnes to testify that "[Sergeant Ford] whispered in my ear and said that 'I have heard rumors that you are going to fail probation because you just have not been acting masculine enough.'"

This Court reviews a district court's ruling to admit evidence over a hearsay objection *de novo*. *United States v. Jinadu*, 98 F.3d 239, 244 (6th Cir.1996) (citing *United States v. Fountain*, 2 F.3d 656, 668 (6th Cir.1993)). We will vacate a jury's verdict based on a district court's erroneous admission of hearsay evidence only if the testimony's admission amounted to more than harmless error. *Field v.*

[3] Because we hold that the district court did not abuse its discretion in allowing the statement to come into evidence under 404(b) and 403, it follows that it was proper for Barnes's attorneys to use such statement when arguing to the jury. Furthermore, in *Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir.1998), we held that the failure to object raises the degree of prejudice that must be shown to get a new trial. The City failed to object to the closing argument, and has not shown a reasonable probability that the jury was improperly influenced by this argument to the jury. Therefore, the City's argument regarding Barnes's closing argument to the jury is equally unpersuasive and also rejected.

Trigg County Hosp., Inc., 386 F.3d 729, 736 (6th Cir.2004) (citing *Argentine v. United Steelworkers of Am.*, 287 F.3d 476, 486 (6th Cir.2002)). The improper admission of hearsay evidence is harmless error "unless it is more probable than not that the error materially affected the verdict." *United States v. Hernandez*, 227 F.3d 686, 696 (6th Cir.2000) (quoting *United States v. Toney*, 161 F.3d 404, 410 (6th Cir.1998)).

The City argues that the admission of this testimony unfairly prejudiced its case. Several cases from this circuit instruct our holding that the statement was not unfairly prejudicial. *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir.1983) (holding that it was reversible error to admit hearsay evidence where there was no evidence that the employees who made hearsay declarations were acting within the scope of their employment). The City also cites *Field*, 386 F.3d 729, 736, and states that the admission of hearsay testimony was highly prejudicial and reversible error where such admission was the strongest evidence available to the defendant. However, our Circuit has also held that the possible erroneous admission of hearsay evidence was harmless error where "sufficient other evidence" supported the verdict. *United States v. Rogers*, 118 F.3d 466, 478-79 (6th Cir.1997).

Even assuming *arguendo* that the statement was inadmissible, we believe that Barnes presented a sufficient amount of other evidence related to the City's decision to terminate Barnes for his failure to conform to sex stereotypes, such that any possible error was harmless when examining the statement in light of other evidence produced at trial. *See Field*, 386 F.3d 729. Therefore, the City is not entitled to reversal, as Sergeant Ford's statement

did not materially alter the verdict because sufficient evidence otherwise supported the verdict.

E. The district court's denial of the City's motion for a new trial

This court reviews a district court's denial of a motion for a new trial under an abuse of discretion standard. *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 891 (6th Cir.2004). A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard. *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir.1995).

A motion for a new trial will not be granted unless the moving party suffered prejudice. *Philip Morris*, 362 F.3d at 891 (citing *Erskine v. Consol. Rail Corp.*, 814 F.2d 266, 272 (6th Cir.1987)) (holding that a new trial will not be granted on the ground that surprise evidence was admitted unless the moving party was prejudiced). Even if a mistake has been made regarding the admission or exclusion of evidence, a new trial will not be granted unless the evidence would have caused a different outcome at trial. *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 514 (6th Cir.1998).

1. The district court did not err in denying the City's motion for a new trial based on the weight of the evidence.

A district court's decision to deny a new trial on the basis of the weight of the evidence shall be reversed only upon finding an abuse of discretion. *United States v. Alpine Industries, Inc.*, 352 F.3d 1017, 1026 (6th Cir.2003).

"In ruling on a motion for a new trial based on the ground that the verdict is against the weight of the evidence, the trial court must compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence." *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir.1991).

The district court did not abuse its discretion in denying the City's motion for a new trial based on the weight of the evidence. While the City offers a plausible explanation of what the evidence showed at trial, we do not think that the jury verdict was unreasonable. The jury was free to draw inferences and interpret the evidence in favor of or against the City. The fact that the City's interpretation of the evidence is itself reasonable does not entitle it to a new trial. The district court compared the evidence presented by both sides in its order denying the City a new trial and concluded that the jury's determination was not against the manifest weight of the evidence. Therefore, we reject this argument.

2. The district court did not err by allowing Barnes to produce evidence and argue about the meaning of Article XII of the City Charter.

The City argues the district court erred when it refused to grant the City a new trial because the district court allowed Barnes to present evidence at trial and argue in his closing argument that Article XII of the City Charter supported Barnes's case. The City argues on appeal that it was unfairly surprised and prejudiced when the district court allowed Barnes to question witnesses and argue to the jury about the effect of Article XII.

In its order denying the City's motion for judgment or for a new trial, the district court addressed the relevancy of Article XII and any alleged unfair prejudice that the City may have suffered as a result of its admission. As used in Rule 403, unfair prejudice "does not mean the damage to the City's case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest decision on an improper basis." *United States v. Mendez-Ortiz,* 810 F.2d 76, 79 (6th Cir.1986). The City suffered no unfair prejudice in this case. The district court, in its Order Denying City's Motion for Judgment, pointed out that the City could hardly have been surprised by something in its own charter. The City had ample opportunity to cross-examine Dr. Cranny about Article XII or call its own expert witness to rebut Dr. Cranny's testimony. The City contends that the prejudicial effect of admitting evidence of Article XII led to a verdict in Barnes's favor. Giving due deference to the district court, we find that the district court did not abuse its discretion in allowing testimony and argument regarding Article XII, and that the City has not shown it was prejudiced. *See Cline,* 362 F.3d at 348; *see also Philip Morris,* 362 F.3d at 891.

3. The district did not err in finding Chief Streicher was a final policymaker and instructing the jury on municipal liability.

In denying the City's motion for judgment as a matter of law or a new trial, the district court found that the City could be liable for Chief Streicher's actions, as he had the final authority to demote Barnes. The City has not presented any new grounds for relief on appeal. Rather, the City has reiterated the arguments it made in its motion

for a new trail. The district court correctly stated and applied the law in its order denying the City a new trial. For this reason, we will only briefly address the City's argument.

The City argues that Chief Streicher was not a "final policymaker," because his decision was subject to the collective bargaining agreement and to approval from the Safety Director, City Manager and City Council. However, Chief Streicher admitted that he did not need approval from the Safety Director when firing someone. Chief Streicher also explained that, when he decided to fail Barnes from probation, the city solicitor told him that the city manager need not be involved. When Barnes attempted to appeal Chief Streicher's decision to the Cincinnati Civil Service Commission, Barnes was told that the decision was not appealable. No board or person reviewed the decision by Chief Streicher. If Chief Streicher is not the final policymaker as it pertains to demoting Barnes, it would appear no one has such authority. Therefore, because it is clear that Chief Streicher did in fact possess final authority to demote Barnes, the City can be held liable for his actions The district court did not rely on clearly erroneous findings of fact, improperly apply the law or use an erroneous legal standard in denying the City's motion for a new trial on this ground. Therefore, we find no abuse of discretion here.

4. The district court did not err when it allowed Barnes to cross-examine and argue to the jury about a legal argument in a city memorandum.

The City argues that the district court erroneously concluded that Barnes's examination of Chief Streicher

about legal arguments presented in the City's Motion for Summary Judgment was not unfairly prejudicial. The district court stated, in its order denying the City judgment as a matter of law and a new trial, the question presented to Chief Streicher was prejudicial to defendant, but "not unfairly so." The district court used the balancing test under Fed.R.Evid. 403 and found that the probative value of the evidence outweighed any prejudice. We agree with the district court that Chief Streicher was not forced to draw any legal conclusions, provided a thoughtful response, and the City had an opportunity to further examine Chief Streicher on redirect. The district court did not apply an erroneous legal standard or misapply the law, and the decision to deny the City's motion for a new trial was not inconsistent with substantial justice. Therefore, the City's argument is rejected.

F. The district court did not abuse its discretion in its award of attorneys fees.

The City contends that the trial court granted Barnes an excessive award of attorneys fees. We review a district court's determination regarding the award of attorneys fees for abuse of discretion. *Paschal v. Flagstar Bank*, 297 F.3d 431, 433 (6th Cir.2002). A district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an incorrect legal standard, or applies the law incorrectly. *Id.* at 434.

The City argues on appeal that the district court abused its discretion for three reasons: (1) By awarding attorneys fees at plaintiff's attorneys' current billing rates; (2) By not reducing plaintiff's total attorneys fees for time expended on non-prevailing causes of action; (3)

By applying a multiplier of 1.75 to plaintiff's total award of attorneys fees. We respectfully disagree.

First, in calculating the amount of attorneys fees in this case, the district court properly applied the "lodestar" method and multiplied the number of hours reasonably expended on the case by a reasonable hourly rate. *See West v. Hess Envt'l Servs., Inc.*, 111 F.3d 132 (6th Cir.1997) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The district court used the "current" market rate in calculating plaintiff's attorneys' reasonable hourly rate because the litigation had been ongoing for nearly six years. In *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), the Court noted that compensation is often received several years after services were rendered in complex civil rights litigation and held that an adjustment for delay in payment by the application of current, rather than "historical," hourly rates is within the contemplation of the attorneys fees statute.

Second, successful and unsuccessful claims are deemed related when they "involve a common core of facts" are "based on related legal theories" or when counsel's time is "devoted generally to the litigation as a whole, making it difficult to divide the hours expended." *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933, 76 L.Ed.2d 40. The district court found that Barnes's attorneys fees should not be reduced in this case based on Barnes litigating unsuccessful claims, because the claims were not separable.

Third, multipliers, or fee enhancements to the Lodestar calculation, are permissible in some cases of "exceptional success." *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The key issue is

whether an adjustment is necessary to the determination of a reasonable fee. *Id.* The Fifth Circuit, in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), enunciated twelve factors that trial courts may consider in calculating reasonable attorney fee awards. The Supreme Court has determined that "Johnson's 'list of 12' . . . provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees. . . . " *Blanchard v. Bergeron*, 489 U.S. 87, 93, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). The twelve factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Blanchard, 489 U.S. at 91 n. 5, 109 S.Ct. 939, 103 L.Ed.2d 67. The district court should "provide a concise but clear explanation of its reasons" for its conclusions regarding an attorney fee award. *Paschal v. Flagstar Bank*, 297 F.3d 431, 433 (6th Cir.2002) (citing *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933, 76 L.Ed.2d 40).

The district court granted a multiplier of 1.75 to the total fee award. The district court provided a clear and concise explanation for its decision, reasoning that a multiplier was appropriate because of the "novelty and

difficulty" of this question and because of the "immense skill requisite to conducting this case properly." The court found the result achieved was extraordinary and the case was highly controversial, based on the affidavits of two Cincinnati attorneys who stated that few lawyers locally or nationally would take such a case.

The district court did not err in its award of attorneys fees. In this case, the district court's decision to award attorneys fees at current market rates and its finding that the time spent litigating Barnes's unsuccessful claims were not based on erroneous findings of fact, did not misapply the law or rely on erroneous legal conclusions. Similarly, the district court's finding that reasonable compensation for the result obtained by Barnes's attorneys could not be obtained without applying a multiplier of 1.75 was not an abuse of discretion. *See Guam Soc. Of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir.1996) (200 percent multiplier upheld because of the undesirability of the case and the exceptional nature of the case); *McKenzie v. Kennickell*, 875 F.2d 330, 338-39 (D.C.Cir.1989) (awarding twenty five percent enhancement for exceptional results and where counsel "remained active in the litigation over a period of fifteen years"); *Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913 (S.D.Ohio 2001) (awarding 150 percent multiplier for solo practitioner who achieved exceptional results by taking an unpopular case others turned down and bringing to light a previously unrecognized cause of action); *Quinn v. Nassau County Police Dept.*, 75 F. Sup.2d 74 (E.D.N.Y.1999) (awarding ten percent multiplier in employment discrimination case due to ground breaking nature of case); *Hollowell v. Gravett*, 723 F.Supp. 107, 110 (E.D.Ark.1989) (awarding seventy five percent quality enhancement

where plaintiff's counsel prepared the case thoroughly and provided superb representation "under the most adverse circumstances."); *Shakman v. Democratic Org.*, 677 F.Supp. 933, 945 (N.D.Ill.1987) (awarding a one third quality enhancement in a class action where the court noted the case had great significance and plaintiffs' counsel showed "imagination and creativity"). While use of such a multiplier nearly doubled the award of attorneys fees, the district court enjoys wide discretion in awarding attorneys fees.[4] In short, we are not convinced that the fees granted by the district court in this case were unreasonable and we find no abuse of discretion here.

III. CONCLUSION

For all the foregoing reasons, we hereby **AFFIRM** the judgment of the district court.

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[4] Our holding acknowledges the wide discretion a district court enjoys in determining the amount of "reasonable" attorneys fees to award a successful Title VII litigant. We hold today that the district court did not abuse its discretion in awarding a multiplier of 1.75 to Barnes's attorneys in this case. However, district courts should recognize that this figure, (1.75), is near the upper end of what we consider "reasonable." Therefore, district courts should not view the decision to uphold the multiplier in this case as an explicit or implicit approval of this large or larger multipliers across the board, or assume that a multiplier, like the one used in this case, could never constitute an abuse of discretion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PHILECIA BARNES, f.k.a. PHILLIP W. BARNES, Plaintiff(s)	Case Number: C-1-00-780
vs.	District Judge Susan J. Dlott
CITY OF CINCINNATI, Defendant(s)	

JUDGMENT IN A CIVIL CASE

(Filed Aug. 6, 2003)

Jury Verdict: This action came to trial before a jury. The issues have been tried and a decision rendered.

IT IS ORDERED AND ADJUDGED

. . . that the defendant is enjoined as follows: (1) Defendant shall not retaliate in any way against Plaintiff for the filing of this lawsuit; and (2) Defendant shall not engage in further discrimination against Plaintiff on the basis of her perceived sexual orientation, gender identity, transsexuality, or her failure to conform to sex stereotypes. (Doc. 103)

. . . that plaintiff be awarded $150,000 in compensatory damages and $140,000 in front pay. (Doc. 80)

. . . that plaintiff be awarded $30,511.00 in back pay. (Doc. 77)

. . . that defendant's motion for judgment in favor of the city or in the alternative for new trial is DENIED. (Doc. 102)

8/6/03 Kenneth Murphy, Clerk

/s/ [Illegible]
Deputy Clerk

Pursuant to S. D. Ohio Civ. R. 79.2(a) and (b), all models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed or offered in evidence shall be withdrawn by counsel without further Order within six (6) months after final termination of the action. All materials not withdrawn shall be disposed of by the Clerk as waste.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Philecia Barnes, formerly known as Phillip W. Barnes	:	
Plaintiff	:	Case No. C-1-00-780
v.	:	District Judge Susan J. Dlott
City of Cincinnati	:	ORDER
Defendant	:	

This matter comes before the Court on four motions: Defendant's Motion to Stay (doc. #87), Plaintiff's Motion for Interim Attorney's Fees and Expenses (doc. #94), Plaintiff's Second Motion for Interim Attorney's Fees and Expenses (doc. #105), and Defendant's Motion for Stay of Judgment and Plaintiff's Attorneys' interim Request for Fees Pending Appeal (doc. #109). For the reasons set forth below, the Court **GRANTS** Plaintiff's two motions for fees and costs (docs. #94, 105) and **ORDERS** Defendant to pay Plaintiffs attorneys' fees and litigation expenses in the amount of $553,725.73. The Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Motion for Stay of Judgment and Plaintiff's Attorneys' Interim Request for Fees Pending Appeal (doc. #109) and **DENIES** Defendant's Motion to Stay (doc. #87) as **MOOT**.

I. PROCEDURAL BACKGROUND

The facts underlying this suit have been laid out in great detail in prior orders of this Court. (*See* docs. #102, 103.) The Court will not repeat them here. However, a brief summary of the procedural background may be

helpful. Transsexual Cincinnati police officer Philecia Barnes tried her case to a jury in February of 2003, claiming employment discrimination in violation of Title VII, 42 U.S.C. § 1983, and Ohio state law. Barnes alleged sex discrimination under Title VII based on her failure to conform to sex stereotypes and that Defendant City of Cincinnati ("the City") violated her rights under the Equal Protection Clause of the Fourteenth Amendment by demoting her on the basis of her perceived sexual orientation, gender identity, transsexuality, and failure to conform to sex stereotypes. The jury found in favor of Barnes on all of her claims. (*See* doc. #80.) The jury awarded Barnes $150,000 in compensatory damages and $140,000 in front pay. (*Id.*) The parties stipulated that Barnes was entitled to $30,511 in backpay. (Doc. #77.) The City moved for a judgment as a matter or law or alternatively for a new trial. (Doc. #88.) The Court denied the City's motion. (Doc. #102.)

Shortly after the jury returned its verdict, Barnes asked for injunctive relief in five forms: (1) reinstatement to the rank of police sergeant; (2) protection from retaliation; (3) protection from further discrimination on the basis of failure to conform to sex stereotypes in violation of Title VII; (4) protection from further discrimination on the basis of sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes in violation of the Equal Protection Clause; and (5) "[i]njunction against Art[icle] XII of the Cincinnati Charter as applied until such time as the City has established employment policies, procedures, and training that implements Article XII in a manner consistent with State and Federal statutory and constitutional law and the other orders of this court." (Doc. #82 at 1-2.) The City opposed Barnes' request in part,

objecting only to Barnes' request for reinstatement and an injunction against the enforcement of Article XII of the Cincinnati City Charter. (Doc. #93.) In light of the City's opposition, Plaintiff withdrew her request for reinstatement and instead asked to receive an award of front pay. (Doc. #95.) The Court enjoined the City from retaliating in any way against Barnes for the filing of this lawsuit and from engaging in further discrimination against Barnes on the basis of her perceived sexual orientation, gender identity, transsexuality, or her failure to conform to sex stereotypes. (Doc. #103.) The Court also ordered entry of judgment consistent with the above injunction and the verdict of the jury, including the award of compensatory damages, front pay, and back pay. (*Id.*) The City appealed a number of the Court's orders (docs. #107, 110) and moved to stay the judgment and Barnes' attorneys' fees petition pending the appeal (doc. #109). Barnes' counsel asks for interim attorney's fees and a denial of the stay unless the City posts a bond. Barnes objects to a stay of injunctive relief. (Doc. #113.)

II. ANALYSIS

Barnes' counsel asks this Court to order an interim fee award of $553,725.73 for work performed through August 11, 2003, That number includes attorney's fees of $301,650.50 with a multiplier of 1.75, which equals $527,888.37, plus costs of $25,837.36. They City opposes this request on the grounds that the hourly rate requested is incorrect, the number of hours spent is unreasonable, and the multiplier is inappropriate. The City seeks a stay of the judgment based on the verdict and backpay stipulation, stay of injunctive relief, and stay of any ruling on the petition for attorney's fees. In the interest of judicial

economy, the City's request for a stay of this Court's ruling on attorney's fees is **DENIED** such that any appeal from this ruling on the fee motion can be consolidated with the pending appeal on the merits.

A. Attorney's Fees

1. "Reasonable Attorney's Fee"

In actions under 42 U.S.C. § 1983, the trial court has the discretion to award to "the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 1988[1]. A prevailing party is one "in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 603 (2001) (citing *Black's Law Dictionary* 1145 (7th ed. 1999)). Put another way, if a plaintiff "receive[s] at least some relief on the merits of his claim," then he has "prevailed." *Id.* Here, a jury returned a verdict for Barnes on all of her claims, and the Court permanently enjoined the City from retaliating or further discriminating against Barnes. Therefore, Barnes is a "prevailing party" under § 1988. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The product of the reasonable number of hours and the reasonable hourly rate is termed the "lodestar." *See City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986). "The party seeking attorneys fees bears the burden of documenting his entitlement to the

[1] Courts may also award attorney's fees to prevailing parties in Title VII litigation. *See* 42 U.S.C.A. § 2000e-5(k).

award." *Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir. 1999). Plaintiff requests that the Court award fees for 255.9 hours billed by Alphonse Gerhardstein at $350 per hour, 787.4 hours billed by Jennifer Branch at $250 per hour, 2.3 hours billed by Robert Laufman at $300 per hour, 137.7 hours billed by paralegals at $65 per hour, and 111.9 hours billed by lawclerks at $50 per hour. Defendants contend that neither the hourly rates charged nor the hours accrued are reasonable.

a. Hourly Rates

The Court looks first at the hourly rates requested for Plaintiff's attorneys. The Sixth Circuit has explained, "Attorney fees under § 1988 are to be based on market rates for the services rendered, . . . Ordinarily, courts look to '[rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984)). An attorney's normal hourly billing rate "should be a key focal point in award determinations," *Kelley v. Metro. County Bd. of Educ.*, 773 F.2d 677, 683 (6th Cir. 1985).

Plaintiff has introduced evidence of her attorneys' educational background, civil rights litigation experience, and impressive credentials as well as evidence that her attorneys have been awarded similar hourly fees in other actions. Plaintiff has also submitted an affidavit from Mr. Robert B. Newman, a third party not associated with Barnes' lawyers or this litigation. Newman attests that the rates charged by Gerhardstein and Branch are reasonable in light of the market rates three years ago and reasonable

in light of these attorneys' background and experiences. The City points to evidence that $250 was the highest rate Branch has billed, arguing that since $250 per hour appears to be the upper limit of what Branch has billed in the past few years, her "normal hourly billing rate" must be lower than that provided. Likewise, the City argues that since Gerhardstein is currently engaged by a client on a non-contingent fee basis at the rate of $300 per hour and Gerhardstein can point to only one client that he bills at $300 per hour, Gerhardstein's rate must be at least $50 per hour lower than he demands. On this evidence, the City asks that the Court determine the "normal hourly billing rate" for Branch and Gerhardstein for each of the four years the litigation was pending, prorate the hours worked by the rates of each of the four years, and award Branch and Gerhardstein's fees accordingly. By "prorate" the City asks that the hours worked in 1999 should be paid with a 1999 rate, the hours worked in 2000 paid with a 2000 rate and so forth.

A district court has broad discretion to determine what constitutes a reasonable hourly rate for an attorney. *See Hudson v. Reno,* 130 F.3d 1193 (6th Cir. 1997) (internal citations omitted). Although the City relies heavily on the proposition that an attorney's "normal hourly billing rate" should control, Sixth Circuit case law holds that in exercising its discretion to determine what constitutes a reasonable hourly rate, a Court should also consider the fair market value of the services rendered by the attorney. *See Northcross v. Bd. of Educ. of Memphis City Schools,* 611 F.2d 624, 638 (6th Cir. 1979); *see also Blum,* 465 U.S. at 895, "In most communities, the marketplace has set a value for the services of the attorneys, and the hourly rate charged by an attorney for his or her services will normally

reflect the training, background, experience and skill of the individual attorney," *Blum*, 465 U.S. at 895. "To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the rates requested are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience and reputation." *Id.* at 896 n.11. Although an attorney's routine hourly rate is a key focal point, "[t]his does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that is not 'reasonable,' because it does not take into account special circumstances, such as unusual time constraint, or an unusually unpopular cause, which affect the market value of the services rendered." *Wells v. New Cherokee Corp.*, 58 F.3d 233, 239-40 (6th Cir. 1995).

Gerhardstein has filed a declaration in support of his $350 per hour fee. Gerhardstein states that civil rights litigation has been his primary focus in the last 26 years of practice, that he has litigated over 40 "significant" civil rights cases and has been counsel or co-counsel on hundreds of civil rights cases filed in the state and federal courts. He has been a frequent presenter at seminars on civil rights and employment law topics and served as an adjunct professor teaching civil rights litigation. Nothing in the City's evidence or argument indicates that $300 per hour or less is Gerhardstein's normal hourly billing rate. Gerhardstein's declaration specifically states that his fee in the vast majority of his cases is contingent on success and that when he charges an hourly rate he charges various rates for various reasons. Gerhardstein has also supplied the Court with a recent Southern District of Ohio

case in which Judge Marbley found Gerhardstein's $350 hourly rate reasonable. *See Women's Med. Prof'l Corp. v. Baird*, No. 03-162 (S.D. Ohio filed Dec. 16, 2003). Considering the above, the Court concludes that Gerhardstein's requested hourly rate of $350 in this case is reasonable.

Branch requests an hourly rate of $250. Since being admitted to practice, Branch has focused her legal practice on civil rights and poverty law litigation. She has litigated over 15 significant cases in these areas and has been awarded fees of $200 per hour for work performed in 2001. Mr. Newman's affidavit states that Branch's requested $250 per hour fee is reasonable in light of market rates in Cincinnati. Since January 2002 clients have paid Branch at an hourly rate of $250. Considering the above, the Court finds that Branch's requested hourly rate of $250 in this case is reasonable.

The City cites no case law in support of its argument that the Court should prorate Branch and Gerhardstein's fees over the four years that litigation was pending.

> When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later . . . Meanwhile, their expenses of doing business continue and must be met in setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.

Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 716 (1987). The Supreme Court has reiterated that compensation received years after the work has been done is not equivalent to prompt payment received as soon

as the service is completed. *Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989). The Court further held that § 1988 warranted an adjustment for this delay, whether by the application of current hourly rates or enhancement of historic rates. *Id.* Thus, the City's argument that work performed by Branch and Gerhardstein in 2000 should be awarded based on rates from 2000 fails. The Court therefore concludes that Gerhardstein should be awarded at an hourly rate of $350 and Branch at an hourly rate of $250. The City does not dispute Laufman's fees nor the fees of the paralegals and lawclerks.[3]

b. Total Hours

As discussed above, prevailing parties may win attorney's fees under § 1988. The City argues that Barnes' counsel has submitted hours for compensation on issues on which Barnes did not prevail, such as the claim for sexual harassment voluntarily dismissed on the eve of trial. The City argues that any time attributed to this claim on which Barnes did not prevail should not be compensated and that Barnes' counsel's time records are not sufficiently detailed to determine the time devoted to the sexual harassment claim. The City argues that, at the very least, the particular hours reported by Barnes' counsel that are clearly designated as exclusively devoted to the dismissed claim should be discounted. The City further

[3] The Court finds, based on the Declaration of Kenneth R. Faller (doc. #94 exh. 7) that Mr. Laufman's rates are within the reasonable range of local attorneys and the rates charged for paralegals and lawclerks is typical of rates charged in Cincinnati for such services. The Court therefore finds that the rates requested for Mr. Laufman, the lawclerks and paralegals are reasonable.

argues that Barnes has submitted hours on an "unrelated Motion for Injunctive Relief" filed and argued post-verdict. (Doc. #121 at 2.) The City contends that although the Court granted the injunction against retaliation and further discrimination, the majority of the motion was devoted to a request for injunction that was denied and a request for reinstatement that Barnes voluntarily withdrew. The City requests that hours devoted to these matters be denied.

Calculation of hours spent solely on Barnes' discarded sex harassment claim is impossible because any evidence and argument offered in support of her sex discrimination claim significantly overlaps with that of the harassment claim. In cases involving a common core of facts or involving related legal theories, plaintiff's counsel may expend hours generally toward the litigation as a whole rather than on a claim by claim basis, allowing recovery for successful claims and for unsuccessful but interrelated claims. *Hensley,* 461 U.S. at 435. "In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit . . . the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Id.* Since Barnes achieved significant success at trial, she is clearly a prevailing party and her counsel's hours spent on the interrelated sex harassment claim should be compensated at a reasonable rate. As for the "unrelated Motion for Injunctive relief," Barnes' claims for injunctive relief tie directly to her claims at trial. The City was enjoined from engaging in behavior for which it had been found liable at trial. The Article XII and reinstatement segments of the motion for injunctive relief were alternative legal theories involving

the same common core of facts that led to a verdict in Barnes' favor at trial and to two forms of injunctive relief post-trial. Therefore, the hours spent working on the motion for injunctive relief – and the Court will add that the hours spent on the motion do not appear to be significant – should also be compensated at a reasonable hourly rate.

Having considered the above issues, the Court finds that the following lodestar is appropriate in this case:

Alphonse Gerhardstein	255.9 hours	x	$350/hour	= $89,565
Jennifer Branch	787.4 hours	x	$250/hour	= $196,850
Robert Laufman	2.3 hours	x	$300/hour	= $690
Paralegals	137.7 hours	x	$65/hour	= $8,950.50
Lawclerks	111.9 hours	x	$50/hour	= $5,595
Total				= $301,650.50

2. The Multiplier

Plaintiff has also requested that the lodestar be multiplied by 1.75. The Supreme Court has disapproved of or limited many of the factors traditionally used to justify the use of multipliers to adjust fee awards. *See Delaware Valley*, 478 U.S. at 566-68 ("the overall quality of performance ordinarily should not be used to adjust the lodestar"), *reargued on one point*, 483 U.S. 711 (1987) (multiplier to account for risk of loss improper); *Hyatt v. Apfel*, 195 F.3d 188, 191 (4th Cir. 1999) (collecting cases). However, multipliers may still be appropriate where a plaintiff has achieved exceptional results. *See Hyatt*, 195 F.3d at 192 ("a multiplier of 1.333 was justifiably applied to the fees on

account of the exceptional results obtained by the plaintiffs' attorneys"). The key issue is whether "such an adjustment is necessary to the determination of a reasonable fee." *Blum*, 465 U.S. at 898. The Sixth Circuit has endorsed the factors delineated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) as evaluative tools when considering a multiplier. *Paschal v. Flagstar Bank*, 297 F.3d 431 (6th Cir. 2002) (relying on *Blanchard v. Bergeron*, 489 U.S. 87 (1989)). These twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Blanchard*, 489 U.S. at 91 n. 5. The Court may consider these factors in calculating the initial fee or while considering a request for a multiplier. *Paschal*, 297 F.3d at 435.

The City argues that none of the Johnson factors apply because "the claims are basically Title VII sex discrimination and a Section 1983 constitutionality claim" (Doc. #121 at 9.) The Court believes that such a categorization does not accurately reflect the nature of the case. This was no average Title VII sex discrimination case but one in which Barnes' counsel were extremely creative in fashioning her case as a Title VII or Equal Protection case based on failure of a public employee with [sic] to conform to sex stereotypes and in proving discrimination based on

gender identity. The novelty and difficulty of this question, combined with the immense skill requisite to conducting this case properly, merits an enhancement. The result obtained by Barnes was indeed extraordinary – a verdict for a transsexual police officer against a municipality for violating her Equal Protection rights by demoting her on the basis of her perceived sexual orientation, gender identity, transsexuality, and failure to conform to sex stereotypes. Finally, as third party affidavits submitted by Barnes' counsel state, the case was highly undesirable. Both Kenneth Faller, a partner at a Cincinnati law firm closely acquainted with segments of the local bar handling civil rights and employment discrimination cases, and Paul Tobias, a Cincinnati labor and employment lawyer, state that they are aware of very few lawyers locally or nationally who would have agreed to take on this case. (*See* doc. # 94, exhs. 7, 8.) Both Faller and Tobias state that in their long experience, the case presented extremely creative and novel lawyering. Based an the above, the Court finds that this level of success demonstrates that the lodestar does not constitute a reasonable fee. Rather, applying a multiplier of 1.75 to the lodestar would provide appropriate and reasonable compensation for the extraordinary result obtained by Plaintiff's counsel. Therefore, the final fee award is:

$301,650.50 (lodestar amount) x 1.75 (multiplier) = $527,888.37

3. Costs

Plaintiff also requests to be reimbursed for $25,837.36 in costs. As the Sixth Circuit has recognized, §1988 authorizes the award of certain out-of-pocket expenses as part of a "reasonable attorney's fee":

> The authority granted in section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.

Northcross, 611 F.2d at 639, Plaintiff has requested reimbursement for costs associated with transcripts, depositions, photocopying, filing fees, telephone calls, and postage. Such expenses "are normally charged to a fee-paying client" and are therefore recoverable. The City has made no objection to Plaintiffs counsel's costs. The Court finds the costs submitted by Plaintiff's counsel to be reasonable and awards the full amount.

B. The Stay

The City requests a stay of the judgment entered for Barnes on the jury verdict, back pay, and injunctive relief. Barnes objects to a stay of execution of the judgment unless a bond is set pursuant to Federal Rule of Civil Procedure 62(d). Rule 62(d) entitles a party who files a satisfactory supersedeas bond to a stay of money judgment as a matter of right. *Arban v. West Pub. Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) (internal citations omitted). Rule 62(d) concerns only stays granted as a matter of right and does not concern stays granted in the court's discretion. *Id.* A district court may, in its discretion, grant a stay without the posting of a bond if the moving party demonstrates that its ability to pay is so plain that the cost of bond would be a waste of money. *Id.* (quoting *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986)). While this Court does not necessarily doubt the City's ability to pay, as this case has proceeded

for nearly four years and the sum of money in question is quite large, the Court declines to exercise its discretion to waive the posting of a supersedeas bond. Thus, the City is entitled to a Stay of Execution on the judgment, but it must post a supersedeas bond of $320,000 plus attorney's fees, costs, and interest. Upon posting a bond of $873,725.73, a stay of the monetary judgment and attorney's fees will be **GRANTED**. As for the injunction, as the injunction prohibits retaliation and further discrimination, the Court has merely enjoined the City from further violation of the law. There is no reason to stay such an injunction and thus a stay of the injunction (doc. #103) shall be **DENIED**.

III. CONCLUSION

For the reasons set forth above, the City's motion to stay the Court's ruling on attorneys' fees is **DENIED**, and the Court awards Barnes' counsel $527,888.37 in attorneys' fees and $25,837.36 in costs.[3] The City's motion to stay the judgment pending appeal is **GRANTED** as to the monetary judgment and **DENIED** as to the injunctive relief.

IT IS SO ORDERED,

s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

[3] The award of fees and expenses is stayed pending appeal, with the City posting the fees and expenses as part of its bond.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PHILECIA BARNES, Plaintiff(s) vs. CITY OF CINCINNATI, Defendant(s)	:	Case Number 1:00cv780 District Judge Susan J. Dlott

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . that the motion to stay the Court's ruling on attorney's fees is DENIED, and the Court awards Barnes' counsel $527,888.37 in attorneys' fees and $25,837.36 in costs. The City's motion to stay the judgment pending appeal is GRANTED as to the monetary judgment and DENIED as to the injunctive relief.

2/27/04

JAMES BONINI, CLERK

___s/Stephen Snyder___
Deputy Clerk

Pursuant to S. D. Ohio Civ. R. 79.2(a) and (b), all models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed or offered in evidence shall be withdrawn by counsel without further Order within six (6)

months after final termination of the action. All materials not withdrawn shall be disposed of by the Clerk as waste.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Philecia Barnes, formerly known as Phillip W. Barnes	:	
Plaintiff	:	Case No. C-1-00-780
v.	:	District Judge Susan J. Dlott
City of Cincinnati	:	ORDER
Defendant	:	

(Filed Aug. 5, 2003)

This matter comes before the Court on Plaintiff's Corrected Motion to Enjoin Discrimination, Order Reinstatement and Enjoin Article XII of the Cincinnati Charter as Applied. (Doc. #82.)

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Philecia Barnes is transsexual. Born Phillip W. Barnes, Plaintiff is currently recognized as a female in public and while on-duty. Plaintiff joined the Cincinnati Police Division ("CPD") in 1981. She was promoted to the rank of serge ant on January 24, 1999. After five months of her six-month term as a probationary sergeant, Plaintiff was demoted on June 22, 1999. On September 18, 2000, Plaintiff sued Defendant City of Cincinnati, claiming employment discrimination in violation of Title VII, 42 U.S.C. § 1983, and Ohio state law. Plaintiff alleged sex discrimination under Title VII based on her failure to conform to sex stereotypes. She also alleged that Defendant violated her rights under the Equal Protection Clause of the Fourteenth Amendment by demoting her on

the basis other perceived sexual orientation, gender identity, transsexuality, and failure to conform to sex stereotypes.

The case proceeded to trial, and a jury found in favor of Plaintiff on all of her claims. The Court instructed the jury that it could find for Plaintiff on her equal protection claim only if it determined that Defendant had a policy of discriminating on the basis of perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes. The jury apparently so found and determined that Plaintiff had established her equal protection claim. The jury awarded Plaintiff $150,000 in compensatory damages and $140,000 in front pay. (Doc. 80.) The parties stipulated that Plaintiff was entitled in $30,511 in backpay. (Doc. #77.)

Shortly after the jury returned its verdict, Plaintiff asked for injunctive relief in five forms:

1. Reinstatement to the rank of police sergeant;

2. Protection from retaliation;

3. Protection from further discrimination on the basis of failure to conform to sex stereotypes in violation of Title VII;

4. Protection from further discrimination on the basis of sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes in violation of the Equal Protection Clause; and

5. "Injunction against Art[icle] XII of the Cincinnati Charter as applied until such time as the City has established employment policies, procedures, and training that implements Article XII in a

> manner consistent with State and Federal statutory and constitutional law and the other orders of this court."

(Doc. #82 at 1-2.) Defendant opposed Plaintiff's request in part, objecting only to Plaintiff's request for reinstatement and an injunction against the enforcement of Article XII of the Cincinnati City Charter. (Doc. #93.) In light of Defendant's opposition, Plaintiff withdrew her request for reinstatement and instead asks to receive an award of front pay. (Doc. #95.)

II. ANALYSIS

Before the Court addresses the specific relief requested by Plaintiff, one holistic argument made by Defendant bears discussion. Defendant argues that Plaintiff's motion should be denied in its entirety because motions under Federal Rule of Civil Procedure 59(e) may not raise new issues. Defendant's argument fails. Rule 59(e) permits the filing of a motion "to alter or amend a judgment." No judgment has been entered yet in this case, however, so a Rule 59(e) motion would be premature. Rather, the Court views Plaintiff's putative "motion" and Defendant's response as briefing that aids the Court in determining the proper scope of relief to be included in the judgment.[1]

Plaintiff asks for injunctive relief to cure violations of both Title VII and the Equal Protection Clause 42 U.S.C.

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[1] The Court also points out that injunctive relief is not a new issue, as Plaintiff asked for such relief in her complaint in addition to damages. (*See* doc. #1 at 7-8.)

§ 2000e-5(g)(1) sets forth the scope of a court's power to award injunctive relief under Title VII:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

"[U]pon a finding of any intentional employment discrimination, a district court possesses broad discretion to craft an injunction that will ensure the employer's compliance with the law." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 467 (6th Cir. 1999). "The proper scope of an injunction is to enjoin conduct which has been found to have been pursued or is related to the proven unlawful conduct." *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994) (citing *Nelson v. Int'l Bhd. of Elec. Workers, Local No. 46*, 899 F.2d 1557, 1564-65 (9th Cir. 1990)).

"Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998). In other words, "plaintiffs must demonstrate that failure to issue the injunction is likely to result in irreparable harm." *Id.* at 1068; *see also Sharpe v. Cureton*, 319 F.3d 259, 273-74 (6th Cir. 2003) (reversing district

court's grant of injunction because it was not "based upon a requisite showing of likely future irreparable harm"). Once a plaintiff establishes her entitlement to injunctive relief, "the injunction 'may be no broader than necessary to remedy the constitutional violation.'" *Sharpe*, 319 F.3d at 272 (quoting *Kallstrom*, 136 F.3d at 1069).

Plaintiff first asks the Court to enjoin Defendant from retaliating against her for filing this lawsuit. Plaintiff continues to work for Defendant. Nearly all of the individuals involved in the decision to demote her still work at the CPD. Therefore, it is possible that Plaintiff may suffer some retaliatory action in the future. Moreover, while retaliation is prohibited under Title VII, *see* 42 U.S.C. § 2000e-3(a), this fact does not make an injunction forbidding such retaliation improper. *See EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987). Instead, as she succeeded in her discrimination claim, Plaintiff should not be forced to initiate another court proceeding to vindicate her rights in the event that Defendant takes retaliatory action. Finally, an injunction forbidding retaliation against only one CPD employee would not place an unduly heavy burden on Defendant. *See Malarkey v. Texaco. Inc.*, 983 F.2d 1204, 1215 (2d Cir. 1993). For these reasons, an injunction forbidding Defendant from retaliating against Plaintiff is proper.

Next, Plaintiff seeks an injunction forbidding further discrimination by Defendant against any employee on the basis of perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes in violation of Title VII and the Equal Protection Clause. "Generally, a person subjected to employment discrimination is entitled to an injunction against future discrimination, unless the employer proves it is unlikely to repeat the practice."

Goodyear Aerospace, 813 F.2d at 1544 (citations omitted). Here, the jury found that Defendant had a policy of discriminating on the basis of perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes. With no indication that this policy has been discontinued, the Court finds that, absent an injunction, it is likely that Defendant may discriminate against Plaintiff again on these grounds. This conclusion is reinforced by the fact that, as noted above, those involved in the decision to demote plaintiff for impermissible reasons still work at the CPD. Finally, the sort of injuries that Plaintiff would incur from future discrimination, such as the emotional distress that Plaintiff described at trial, are irreparable and justify injunctive relief. *See EEOC v. Chrysler Corp.* 733 F.2d 1183, 1186 (6th Cir. 1984).

On the other hand, Plaintiff has come forth with no evidence that any other police officers or city employees have been affected adversely by Defendant's discriminatory policy. Thus, the instant case differs from those cited by Plaintiff as support for a more sweeping injunction: in those cases the discrimination in question was proven to impact more than just one employee. *See Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 558 (9th Cir. 1983) (approving system-wide relief where twelve employees challenged application of age-discriminatory policy); *Evans v. Harnett County Bd. of Educ.*, 384 F.2d 304, 306 (4th Cir. 1982) (upholding broad injunction against district-wide discriminatory policy); *Spina v. Forest Pres. Dist. of Cook County*, No. 98-C-1393, 2002 WL 1769994, at *2 (N.D. Ill. July 31, 2002) (testimony of "[n]umerous female officers" about discrimination and harassment justified broad injunctive relief). Thus, while the Court finds that injunctive relief preventing future discrimination against Plaintiff in

violation of Title VII and the Equal Protection Clause is appropriate, an injunction forbidding all such discrimination on a city-wide level is not.

Finally, Plaintiff asks the Court to enjoin Article XII of the Cincinnati City Charter "as applied" until the City establishes employment policies that implement Article XII consistently with state and federal statutes and constitutions.[3] As noted above, injunctive relief is proper only "to enjoin conduct which has been found to have been pursued or is related to the proven unlawful conduct." *Wilson Metal Casket Co.*, 24 F.3d at 842 (citation omitted). At trial, Plaintiff's counsel and Plaintiff's expert witness, Dr. Charles Cranny, theorized that Article XII may have influenced Defendant's discriminatory conduct. Plaintiff also put forth a wealth of other proof of discrimination, including evidence of discriminatory statements made by her supervisors and of her relative qualifications compared to those of other probationary sergeants who had not been

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[3] Article XII is entitled, "No Special Class Status May Be Granted Based Upon Sexual Orientation, Conduct or Relationships." and reads:

> The city of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Cincinnati, Oh., City Charter art. XII (1993).

demoted. The jury found for Plaintiff, but any theorizing about what specific evidence led to its conclusion would be speculative. With respect to Article XII, the provision, on its face, does not require the sort of discrimination suffered by Plaintiff and the only evidence that Plaintiff presented of a connection between Article XII and Plaintiff's demotion was purely theoretical. Thus, the Court finds that an injunction of Article XII "as applied" is inappropriate.

III. CONCLUSION

For the reasons set forth above, the Court **ENJOINS** Defendant as follows:

1) Defendant shall not retaliate in any way against Plaintiff for the filing of this lawsuit;

2) Defendant shall not engage in further discrimination against Plaintiff on the basis of her perceived sexual orientation, gender identity, transsexuality, or her failure to conform to sex stereotypes.

Additionally, the Court **ORDERS** the Clerk of Court to enter judgment consistent with the above injunction and the verdict of the jury, including the award of compensatory damages, front pay, and back pay.

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PHILECIA BARNES, f.k.a. PHILLIP W. BARNES	:	
Plaintiff(s)	:	Case Number 1:00cv780
v.	:	District Judge Susan J. Dlott
CITY OF CINCINNATI	:	
Defendant(s)	:	

JUDGMENT IN A CIVIL CASE

Jury Verdict: This action came to trial before a jury. The issues have been tried and a decision rendered.

IT IS ORDERED AND ADJUDGED

. . . that the defendant is enjoined as follows: (1) Defendant shall not retaliate in any way against Plaintiff for the filing of this lawsuit; and (2) Defendant shall not engage in further discrimination against Plaintiff on the basis of her perceived sexual orientation, gender identity, transsexuality, or her failure to conform to sex stereotypes. (Doc. 103)

. . . that plaintiff be awarded $150,000 in compensatory damages and $140,000 in front pay. (Doc. 80)

. . . that plaintiff be awarded $30,511.00 in back pay. (Doc. 77)

. . . that defendant's motion for judgment in favor of the city or in the alternative for new trial is DENIED. (Doc. 102)

8/6/03

Kenneth Murphy, Clerk

/s/ [Illegible]
Deputy Clerk

Pursuant to S. D. Ohio Civ. R. 79.3(a) and (b), all models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed or offered in evidence shall be withdrawn by counsel without further Order within six (6) months after final termination of the action. All materials not withdrawn shall be disposed of by the Clerk as waste.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Philecia Barnes, formerly known as Phillip W. Barnes	:	**Case No. C-1-00-780**
Plaintiff	:	**District Judge Susan J. Dlott**
v.	:	
City of Cincinnati	:	**ORDER**
Defendant	:	

(Filed July 25, 2003)

This matter comes before the Court on Defendant City of Cincinnati's Motion for Judgment or in the Alternative, for New Trial. (Doc. #88.) For the reasons set forth below, Defendant's motion is **DENIED.**

I. FACTUAL BACKGROUND

Plaintiff Philecia Barnes is a transsexual. Born Phillip W. Barnes, she is currently recognized as a female in public and while on-duty as an officer in the Cincinnati Police Division ("CPD"). Plaintiff joined the CPD in 1981 and was promoted to the rank of sergeant on January 24, 1999. She was demoted five months later on June 22, 1999, during her six-month term as a probationary sergeant. On September 18, 2000, Plaintiff sued Defendant City of Cincinnati, claiming employment discrimination in violation of Title VII, 42 U.S.C. § 1983, and Ohio law. The case proceeded to trial, and a jury found in favor of Plaintiff. Specifically, with respect to her Title VII and Ohio law claims, the jury found that Plaintiff's failure to conform to

sex stereotypes was a motivating factor in Defendant's decision to demote her and that Defendant would not have demoted Plaintiff if her failure to conform to sex stereotypes had played no role in the decision. (*See* doc. #80.) As to Plaintiff's equal protection claim, the jury found that Defendant had discriminated against Plaintiff illegally on the basis of her perceived sexual orientation, gender identity, transsexuality, and failure to conform to sex stereotypes. (*See id.*) The jury awarded Plaintiff $150,000 in compensatory damages and $140,000 in front pay. (*Id.*) The parties stipulated that Plaintiff was entitled to $30,511 in backpay. (Doc. #77.) Defendant now moves under Federal Rule of Civil Procedure 50 for judgment as a matter of law or, in the alternative, for a new trial pursuant to Federal Rule of Civil Procedure 59(a).

II. ANALYSIS

A. Rule 50 Motion

"Under Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 149 (2000) (quoting Fed. R. Civ. P. 50(a)). In entertaining a Rule 50 motion, "the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 150. The Supreme Court has instructed further, "the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence

comes from disinterested witnesses.'" *Id.* at 151 (citation omitted).

Defendant asks for judgment as a matter of law under Rule 50 on only one issue,[1] arguing that the evidence presented at trial did not provide a legally sufficient basis for a reasonable jury to find that Defendant would not have demoted Plaintiff regardless of her failure to conform to sex stereotypes. Specifically, Defendant contends that the evidence indisputably proved that it would have demoted Plaintiff because she could not adequately perform her duties and lacked the integrity required of a CPD sergeant.

The evidence at trial, viewed in a light most favorable to Plaintiff, showed:

- Plaintiff's performance ratings as a probationary sergeant, though low, surpassed those of at least one other probationary sergeant who had passed probation previously.
- No other probationary sergeant had ever failed probation.
- Plaintiff's ambiguous sexuality and her practice of dressing as a woman outside of work were well-known within the CPD.
- One of Plaintiff's supervisors told her that she was not sufficiently masculine, and numerous supervisors and peers criticized her

[1] In fact, Defendant never explicitly sets forth any argument at all for judgment as a matter of law under Rule 50. The Court gleans this one argument from a section of Defendant's brief in support of this motion titled, "Jury Instructions." (Doc. #88 at 5-6.)

for lacking a nebulous, but apparently crucial, quality called "command presence."

- Two months into her probation, Plaintiff was placed in a "Sergeant Field Training Program" ("SFTP") under the constant scrutiny of other sergeants who recorded every mistake that she made.
- The intensive oversight of the SFTP caused her significant stress.
- This stress caused her to commit mistakes in fulfilling her duties as a sergeant, many of which involved the correct completion of paperwork.
- Plaintiff's dishonesty, including lying to a supervisor, stemmed from her fear of failing under the intense scrutiny of the SFTP.
- No probationary sergeant before or since Plaintiff has been placed in a program similar to the SFTP.

Taken together, these facts support two reasonable conclusions: 1) Plaintiff was able to perform her sergeant duties at a sufficient level to pass probation; and 2) even to the extent that Plaintiff failed to perform her sergeant duties adequately or display the appropriate level of integrity,[2] these failings were caused by Defendant's improper discrimination and therefore do not provide independent bases for her failure of probation and demotion. The jury

[2] The Court notes that Defendant's contention that Plaintiff's integrity made her unfit to be a sergeant suffers from one flaw. Specifically, Defendant never presented evidence explaining how Plaintiff's dishonesty disqualified her from a position as a sergeant but did not make her unfit to remain as an officer.

could have drawn either of these conclusions in reaching its verdict. Consequently, the Court denies Defendant's motion for judgment as a matter of law on this issue.

B. Rule 59(a) Motion

Rule 59(a) permits the Court to grant a new trial in an action tried to a jury if "the verdict is against the weight of the evidence, [] the damages are excessive, or [], for other reasons, the trial was not fair to the party moving," *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). *See* Fed. R. Civ. P. 59(a) ("A new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the court of the United States."). Additionally, motions under Rule 59(a) "may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Id. See* 11 Charles Alan Wright *et al., Federal Practice and Procedure* § 2805 (2d ed. 1995). A district court's power to grant a new trial arises from its duty to prevent injustice. *See Wilhelm v. Blue Bell Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985); 11 Wright *et al., supra*, §§ 2803, 2805. That same duty underlies Federal Rule of Civil Procedure 61, which provides that no evidentiary or legal error "is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice." Fed. R. Civ. P. 61. "'Plainly Rule 61 teaches that the proceedings are not to be disturbed because of an error that prejudiced no one.'" *Elwell v. Univ. Hosp. Home Care Servs.*, 276 F.3d 832, 844 (6th Cir. 2002) (quoting 11 Wright *et al., supra*, § 2883).

Here, Defendant argues that the Court committed four errors requiring a new trial: 1) giving erroneous jury instructions; 2) admitting Article XII of the Cincinnati City Charter into evidence and allowing Plaintiff's counsel to question witnesses about it; 3) ruling that CPD Chief of Police Thomas J. Streicher, Jr. was a policymaker for purposes of holding Defendant liable under section 1983; and 4) allowing Plaintiff's counsel to question Chief Streicher about one of Defendant's arguments in support of its motion for summary judgment. Defendant also claims that a new trial is proper because the jury's verdict was, at least in part, against the weight of the evidence.

1. Jury instructions

Defendant contends that the Court made two errors in its instructions to the jury. First, Defendant argues that the Court improperly instructed the jury that Plaintiff could prevail on her Title VII claim by showing that Defendant discriminated against her because she failed to conform to male stereotypes. Second, Defendant asserts that the Court failed to instructed [sic] the jury that discrimination against Plaintiff on the basis of her perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes did not violate the Equal Protection Clause if it was rationally related to a legitimate government interest. These arguments merely rehash contentions that the Court rejected in its order denying Defendant's motion for summary judgment. (*See* doc. #37 at 9, 17-18.) The Court sees no reason to revisit its rulings here.

2. Article XII

Article XII of the Cincinnati City Charter forbids the City of Cincinnati from enacting any ordinance or other policy that "provides that homosexual, lesbian, or bisexual orientation, status, conduct or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment." Cincinnati, Oh., City Charter art. XII. Plaintiff's expert witness, Dr. Charles Cranny, testified that Article XII could give CPD officers the impression that Defendant condones discrimination against homosexuals, lesbians, and bisexuals. Chief Streicher testified that Article XII does not give such an impression and that the CPD forbids discrimination of any sort.

Defendant makes two distinct, if not distinctly articulated, arguments that the Court improperly admitted into evidence Article XII and testimony about it. First, Defendant contends that the evidence was irrelevant and inadmissible under Federal Rule of Evidence 402. Second, Defendant asserts that the evidence should have been excluded under Federal Rule of Evidence 403 because the unfair prejudice and confusion of issues caused by its admission far outweighed its probative value.

Rule 402 dictates, "Evidence which is not relevant is not admissible." Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Plaintiff alleged discrimination in violation of the Equal Protection Clause on the basis of her perceived sexual orientation.

Article XII, even though it does not violate the Equal Protection Clause, *see Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), singles out homosexuals, lesbians, and bisexuals. Unlike any other class of citizen, under Article XII homosexuals, lesbians, and bisexuals may not receive special legal protection from Defendant. By treating these groups differently, Article XII reasonably may encourage, or at least be seen to vindicate, discrimination against members of those groups or anyone who is perceived to be a member. Therefore, Article XII is relevant under Rule 402 because its existence tends to make it more probable that Plaintiff suffered illegal discrimination.

Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. According to Defendant, it suffered "extreme prejudice" when the Court allowed Plaintiff to introduce Article XII into evidence and elicit testimony about its application within the police department, because Plaintiff neither listed Article XII on her exhibit list nor mentioned Article XII is [sic] any prior submission in this case. (Doc. #99 at 6.) Additionally, Defendant argues that the admission of Article XII likely confused the jury by improperly implying that Title VII forbids discrimination on the basis of sexual orientation or transsexuality.

Defendant's first argument is essentially that it suffered unfair prejudice because it was surprised when Plaintiff introduced Article XII as evidence. Defendant, though, did not object to the admission of Article XII on

the ground of surprise. By not so objecting, Defendant waived that objection. *See* Fed. R. Evid. 103(a)(1) [sic] (no error admitting evidence unless "a timely objection or motion to strike appears on the record, stating the specific ground of objection, if the specific ground was not apparent from the context"). Even if Defendant had properly preserved its objection, it did not request a continuance to prepare any necessary rebuttal to the Article XII evidence, as suggested by the advisory committee's notes to Rule 403. *See* Fed. R. Evid. 403 advisory committee's note (in case of surprise, "the granting of a continuance is a more appropriate remedy than exclusion of the evidence"). Finally, Defendant suffered no unfair prejudice. It certainly was not surprised that Article XII is in the Cincinnati City Charter and had ample opportunity to cross-examine Dr. Cranny about Article XII or call its own expert witness to rebut Dr. Cranny's testimony.

Next, Defendant argues that the discussion of Article XII likely led the jury to believe erroneously that Title VII prohibits discrimination on the basis of sexual orientation or transsexuality. The Court Finds such confusion unlikely. As explained above, Article XII is relevant to whether Defendant discriminated against her in violation of the Equal Protection Clause. Defendant, though, would have the Court exclude Article XII because it may be irrelevant to Defendant's Title VII and Ohio law claims.[3] The Court instructed the jury that in order to prove her Title VII and Ohio claims, "Plaintiff must prove that her failure to conform to sex stereotypes was a motivating factor in Defendant's decision to demote Plaintiff." This

[3] The Court need not, and does not, pass on where Article XII is actually relevant to Plaintiff's Title VII and Ohio state law claims.

instruction is clear – only evidence of discrimination based on Plaintiff's failure to conform to sex stereotypes was relevant to Plaintiff's Title VII and Ohio state law claims. (*See* doc. #37 at 8-9 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (holding that Title VII and Ohio state law prohibit discrimination against employee for failure to conform to sex stereotypes.) Juries are presumed to follow a court's instructions. *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 794 (6th Cir. 2002). The mere fact that the jury here had to differentiate between evidence that is relevant to one of Plaintiff's claims and not to another is no reason to upset this presumption.

3. Finding that Chief Streicher was a policymaker

Defendant argues that the Court erred by finding that Chief Streicher had final policymaking authority to demote probationary sergeants for the purpose of imputing liability to Defendant under 42 U.S.C. § 1983. The Court decided the issue during the trial and instructed the jury, "The Court has determined that Chief of Police Thomas Streicher, Jr. was the policy maker responsible for demoting Plaintiff, within the meaning of this instruction. . . . Therefore, if you find that the acts of Chief Streicher deprived Plaintiff of constitutional rights, Defendant is liable for such deprivations." Defendant contends that the Court's ruling and this instruction were incorrect.

While a municipality is a "person" under § 1983, it is liable only when the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated

by that body's officers" or was committed "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). However, the constitutional violation need not have occured pursuant to a formalized rule or long-standing tradition for liability to attach. Rather, "municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Specifically, when a decision is made by a municipality's "authorized decisionmakers" in the relevant area, the municipality is liable. *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994). In determining who is the authorized decisionmaker, courts should look to "'state and local positive law,' such as statutes, ordinances, and regulations, and less formal sources of law such as local practice and custom." *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993).

Under the Administrative Code, the chief of police shall "have control of the assignment and stationing of the members of the police department and the direction of the police work of the city . . . *subject to the control, direction and supervision of the city manager.*" Cincinnati, Oh., Administrative Code art. [illegible], § 4 (1999) (emphasis added). Yet, Chief Streicher testified at trial that the final decision of whether to fail Plaintiff on her probation rested with him and that the decision did not need to be approved by anyone else in city government. (*See* doc. #91 at 7-8.) In his deposition, Chief Streicher explained farther that the city manager has the final authority to decide when to demote an officer for disciplinary reasons. (Deposition of Thomas J. Streicher at 10.) However, when Chief Streicher

decided that he wanted to fail Plaintiff on probation for non-disciplinary reasons, he consulted the city solicitor to determine whether the city manager had to approve the decision. (*Id.* at 11.) The city solicitor told him that the city manager did not need to be involved. (*Id.*) Later, when Plaintiff attempted to appeal Chief Streicher's decision to the Cincinnati Civil Service Commission, she was told that the decision was not appealable. (Deposition of Philecia Barnes at 253, 273.)

To summarize, Chief Streicher made the decision to demote Plaintiff and neither the city manager nor the Civil Service Commission reviewed that decision, even though the Administrative Code subordinated Chief Streicher to the city manager. Based on these facts, then, who had final authority to demote Plaintiff, such that their decision made the City liable? Two cases from the Sixth Circuit, *Meyers v. City of Cincinnati, supra*, and *Feliciano v. City of Cleveland, supra*, help answer these questions. In *Meyers*, the plaintiff, an assistant fire chief, sued the City of Cincinnati, claiming that he had been forced to retire in retaliation for speech protected by the First Amendment. The plaintiff complained about his retirement to the Civil Service Commission, but the Commission rejected his complaint on procedural grounds. The City of Cincinnati argued that it was not liable under *Monell* because the decision to force the plaintiff to retire was made by the fire chief, who did not have final policy-making authority. The Sixth Circuit disagreed and found that the review and affirmation of the decision by the Civil Service Commission constituted a final decision for which the City was liable. *Meyers*, 14 F.3d at 1118. That the Civil Service Commission ultimately did not address the merits of the plaintiffs argument was irrelevant, because "[a]

municipality may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official and thereafter studiously refusing to review his unconstitutional action on the merits." *Id.*

In *Feliciano,* police cadets in the City of Cleveland claimed that a decision by the chief of police to require them to undergo drug testing violated the Fourth and Fourteenth Amendments. Much like in the instant case, the Cleveland city code subordinated the chief of police to another city official, in that case the director of public safety. The Sixth Circuit did not end its inquiry there, however, instead examining "Ohio procedure and custom" to see if, contrary to the city code, they placed final policymaking authority elsewhere. *Feliciano*, 988 F.2d at 655 (citing *Jett*, 491 U.S. 737). The plaintiffs attempted to show that the chief of police customarily set policy regarding drug testing by producing a number of policy statements that the chief had issued on the subject. The Sixth Circuit found that these statement [sic] established only that the chief of police had the discretionary authority to issue policy statements. The plaintiffs failed to show that the chief of police had final policymaking authority, though, because "there [wa]s no showing that the Director [of Public Safety] d[id] not retain the power to review policy statements issued by the Chief of Police regarding drug testing." *Id.* at 656.

Here, like in *Feliciano*, the City of Cincinnati's Administrative Code on its face subordinates Chief Streicher to the city manager. Unlike in *Feliciano*, however, the evidence shows conclusively that Chief Streicher's authority to determine whether to demote probationary sergeants was not merely discretionary. Chief Streicher testified that he understood his decision on Plaintiff's demotion to be

final and that it could not be reviewed by the city manager. Of course, by itself this testimony is insufficient to show conclusively that Chief Streicher had final authority, as subordinate officials do not always acknowledge where they lack authority. However, the city solicitor, "the legal advisor of the city government," Cincinnati, Oh., Administrative Code art. III, § 2, confirmed that the city manager need not be involved in the decision to demote plaintiff and thus that Chief Streicher had the final say on the matter. Moreover, the Civil Service Commission refused to hear Plaintiff's appeal from her demotion. Thus, whether the city manager or Civil Service Commission had the authority under the Administrative Code to review Chief Streicher's decision, neither of them would. Just as in *Meyers*, Defendant "may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official [Chief Streicher] and thereafter studiously refusing to review his unconstitutional action on the merits."[4] 14 F.3d at 1118. Consequently. Chief Streicher had final policymaking authority in the relevant area.

---

[4] Defendant also contends that the disposition of this issue is controlled by an order issued by Judge Herman J. Weber, one of this Court's brethren, in *Jorg. v. City of Cincinnati*, No. C-1-02-374 (S.D. Ohio. Mar. 7. 2003) (slip opinion). There, Judge Weber ruled that 1) the chief of police did not have final policymaking authority to suspend employees for disciplinary reasons; and 2) the chief of police did not have final policymaking authority to forbid city employees from doing outside work. *Jorg*, No. C-1-02-374, at 8-10. *Jorg* is distinguishable from the instant case. First, the Administrative Code explicitly delegates to the city manager the authority to dismiss, suspend, and discipline city employees. Thus, unlike here, the city manager explicitly possessed final authority to make the relevant decision. Second, in ruling that the chief of polite does not have final policymaking authority to forbid officers from doing outside work, Judge Weber relied solely on the fact that the Administrative Code generally subordinated the

(Continued on following page)

4. Questioning of Chief Streicher at trial

Defendant contends that the Court improperly Permitted Plaintiff's counsel to cross-examine Chief Streicher as follows about one of Defendant's arguments in its brief in support of its motion for summary judgment:

> Q. Okay. Well, I'm going to show you a document, which is page 35 of the city's memorandum in summary judgment.
>
> . . .
>
> Q. Let me read you the sentence. Okay?
>
> A. Yes, sir.
>
> Q. Assuming arguendo that the city did treat Plaintiff differently, such differential treatment of a transsexual police officer, a police officer with a rare psychiatric disorder, bears a rational relationship to the legitimate governmental purpose in employing or promoting competent and capable police officers.
>
> Now, so would you agree that the city claims that transsexualism is a rare psychiatric disorder and that the city is legally permitted to treat transsexual police officers differently because they are transsexual?
>
> . . .
>
> A. I would simply tell the jury that, without seeing the entire document, it's difficult for

---

chief of police to the city manager and did not consider whether custom demanded a different result. Here, however, the evidence showed that procedure and custom establish Chief Streicher as the final policymaker.

> me to interpret one sentence out of a document, and it's also difficult for me to say what treating differently means. Does that mean which locker room you use, which restroom you use, which car you use, which type of uniform you wear? All those, I just don't understand or know what it means without seeing the entire statement. Like, I don't think it would be fair for me to even try to come to a conclusion based on one sentence out of an entire document.

(Doc. #91 at 69-71.) Defendant's argument on this point is far from clear, but Defendant apparently asserts that allowing this line of questioning was prejudicial to Defendant, presumably unfairly so, because it forced Chief Streicher to draw legal conclusions and to answer questions for which he was unprepared.

As noted above, Federal Rule of Evidence 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" Fed. R. Evid. 403. The question posed by Plaintiff's counsel certainly was prejudicial to Defendant, but not unfairly so. Chief Streicher was not forced to draw any legal conclusions; he merely was asked to agree or disagree with Plaintiff's counsel's characterization of one sentence of Defendant's brief in support of its motion for summary judgment. Even though arguably unprepared to answer the question, Chief Streicher provided a cogent, thoughtful response, and, to the extent that his response was inadequate, Defendant had ample opportunity to further examine Chief Streicher on redirect. Thus, the Court properly allowed the question under Rule 403. Additionally, even if the question should

have been excluded under Rule 403, that single question did not so prejudice Defendant as to interfere with substantial justice. *See* Fed. R. Civ. P. 61.

5. Verdict against weight of the evidence

Finally, Defendant argues that the jury found against the weight of the evidence that Defendant would not have demoted Plaintiff absent improper consideration of her failure to conform to sex stereotypes. "[I]n ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, the trial court must compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence." *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991) (citation omitted). The standard for granting a motion for a new trial on this ground is less deferential to the jury's verdict than that for granting a judgment as a matter of law. *See* 11 Wright *et al.*, *supra*, § 2806.

The Court set forth in section II.A the evidence supporting Plaintiff's position that she would not have been demoted if Defendant had not improperly discriminated. Defendant presented evidence to the contrary, including the testimony of a number of Witnesses who opined that Plaintiff could not perform her sergeant duties satisfactorily. Defendant also elicited testimony that Plaintiff's statistical evidence, which showed that Plaintiff's performance ratings surpassed those of another probationary sergeant who passed probation, did not reflect accurately whether Plaintiff possessed the necessary qualifications for being a CPD sergeant. Having compared the evidence presented by Plaintiff and by Defendant on this issue, the

Court concludes that the jury's determination was not against the manifest weight of the evidence.

III. CONCLUSION

For these reasons, the Court **DENIES** Defendant City of Cincinnati's Motion for Judgment or in the Alternative, for New Trial. (Doc. #88.)

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Diott
United States District Judge

Nos. 03-4110/04-3320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILECIA BARNES, Plaintiff-Appellee, v. CITY OF CINCINNATI, Defendant-Appellant.	)	ORDER (Filed Jun. 8, 2005)

BEFORE: GILMAN and SUTTON, Circuit Judges; and MCKEAGUE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* Hon. David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PHILECIA BARNES, formerly known as PHILLIP W. BARNES	:	
Plaintiff	:	**Case No. C-1-00-780**
	:	**District Judge Susan J. Dlott**
v.	:	
CITY OF CINCINNATI	:	
Defendant	:	

VERDICT FORM
(Filed February 26, 2003)

The jury must unanimously agree on the answers to each question.

Disparate Treatment Claims

1. Do you find that Plaintiff has proven by a preponderance of the evidence that Plaintiff's failure to conform to sex stereotypes was a motivating factor in Defendant's decision to demote Plaintiff from sergeant to police officer?

YES __X__ NO _____

If your answer to Question 1 is "YES," then proceed to Question 2. If your answer to Question 1 is "NO," then proceed to Question 3.

2. Do you find that Defendant has proven by a preponderance of the evidence that Defendant would have demoted Plaintiff even if Plaintiff's failure to conform to sex

stereotypes had played no role in the employment decision?

YES _____ NO __X__

Equal Protection Claim

3. Do you find, by a preponderance of the evidence, that Plaintiff has proven her equal protection claim?

YES __X__ NO _____

If you answered "YES" to Question 1 and "NO" to Question 2., then proceed to Question 4. Also, if you answered "YES" to Question 3, then proceed to Question 4. Otherwise, do not answer any of the following questions: simply sign the verdict form and notify the Courtroom Deputy.

Damages

4. What amount of compensatory damages, as defined on page 29, if any, would fairly compensate Plaintiff?

$150,000

You need not determine the amount of back pay, since the parties have stipulated to the proper amount.

5. What amount of front pay, as defined on page 31, if any, would fairly compensate Plaintiff?

$140,000

EACH JUROR SHOULD SIGN BELOW.

The above are the jury's unanimous verdict and answers to the special interrogatories. Signed:

/s/ [Illegible]
Foreperson

/s/ Mary Ann Williams	/s/ Jeffrey H. Bostich
/s/ Mary Jo Blankemeyer	/s/ James L. Henson
/s/ [Illegible]	/s/ Debbie [Illegible]
/s/ Peter J. [Illegible]	Date: 2-26-03

(2)

No. 05-292

Supreme Court, U.S.
FILED
OCT 5 - 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

PHILECIA BARNES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

A unanimous panel of the Sixth Circuit has affirmed a jury verdict in this sex discrimination case. The plaintiff was demoted from sergeant after his supervisor told him that he was not masculine enough and after he was treated differently than comparable employees in numerous ways in order to justify the demotion. After a ten-day jury trial the plaintiff won on both equal protection and Title VII sex stereotyping claims. The five questions raised by the city reveal no conflict among the circuits and no broad legal issues supporting the exercise of certiorari jurisdiction. The petition should be denied.

STATEMENT OF THE CASE

As the Sixth Circuit's summary of the facts shows, the facts of this case are extremely unusual. Pet. App. 2-7. Respondent Barnes is a unique individual. At the time of his promotion, it was well known within the Cincinnati police department that while off duty Philip Barnes[1] wore make-up,[2] groomed himself as a woman, and wore women's clothes. Pet. App. 4, 62. The vice squad even videotaped him when he was out at night. Pet. App. 4. The City

[1] At the time of his probation and demotion, Respondent was known as Philip Barnes. He did not change his name to Philecia Barnes until after the Complaint was filed. Therefore, in this brief, he will be referred to as Philip Barnes.

[2] The City incorrectly states (Pet. 7) that the Cincinnati Police Department does not allow any officers, male or female, to wear pink make-up or pink nail polish. Contrary to the City's assertion, the City does allow women to wear moderate makeup, including neutral shades of fingernail polish. Cincinnati Police Department Policy §12.020(2)(b), Resp. App. 2-3.

created a special sergeant training program intended to make Barnes fail. The City placed Barnes in this unique sergeant training program, which was never used with any other probationary sergeant in the history of the Cincinnati police department. Pet. App. 4, 63. The training program required Barnes to be evaluated by seven different supervisors on a daily basis for three months. Each supervisor would rate Barnes on a scale of one to 25 in 18 categories on a six-page form. Pet. App. 4. Barnes, who ranked 18th out of 105 officers who passed the promotional exam and had been a marine sergeant, was the only sergeant to fail probation in the history of the Cincinnati police department. Pet. App. 62.

There was sufficient evidence of disparate treatment for the jury to return a verdict for Barnes. A high-ranking Cincinnati police official told Barnes he was not masculine enough. Pet. App. 6. The seven supervisors who evaluated Barnes daily criticized him for not having "command presence." Pet. App. 3, 62-63. However, each one defined "command presence" differently. Pet. App. 3. Chief Streicher demoted Barnes for his lack of command presence. Pet. App. 6. Barnes's expert testified that employers who use subjective factors like "command presence" to evaluate an employee are engaging in stereotyping. Pet. App. 3. Additionally, Barnes's expert testified that Barnes's evaluation scores were above the minimum required for passing probation and that he had scores higher than one sergeant who had passed. Pet. App. 6.

The City asserts that the Chief failed Barnes from probation due to "significant and uncontroverted inadequate performance." Pet. 3. However, the evidence was clear that the Chief failed Barnes due to his lack of "command presence" (Pet. App. 6) and that Barnes's evaluations

showed he did pass the minimum requirements for probation. Pet. App. 6. This evidence also refutes the City's allegations that Barnes was unable to properly perform as sergeant. Pet. 4. Barnes showed at trial that the training program was designed for the purpose of treating him differently and that he adequately performed his duties as a probationary sergeant. The jury expressly found that the City would not have demoted Barnes if gender stereotyping had played no role in the employment decision. *See* Pet. 79-80 (jury verdict form).

Contrary to the City's factual statement, the evidence showed not that Barnes was incompetent, but that the intensive oversight of the special training program caused him significant stress, affecting his performance. Pet. App. 63. The City sent him to a psychologist, who recommended he receive therapy to improve his performance. Pet. App. 5, 63. That recommendation was withheld from Barnes because the City wanted him to fail.

The City also contends, incredibly, that there was no direct or circumstantial evidence that Barnes was treated differently than a similarly situated male or female. Pet. 5. At trial, there was evidence that a male probationary sergeant, with lower scores than Barnes, passed probation. Pet. App. 6. There was also evidence that a high-ranking supervisor told Barnes he needed to act more masculine and stop wearing make-up. Pet. App. 6. Female police officers, by contrast, were permitted to wear make-up. Resp. App. 2-3.

Finally, the City intentionally misquotes Barnes's Complaint as claiming that he was demoted because he was a transsexual. Pet. 3. The City must make this false factual assertion in order to support its argument that

Title VII does not protect transsexuals. In fact, however, the Complaint carefully states a Title VII sex stereotyping claim as well as an equal protection claim.[3]

REASONS FOR DENYING THE WRIT

The Writ should be denied for three reasons. First, nothing in the opinion below concerning the circumstances under which a male employee (transsexual or otherwise) may bring a Title VII disparate treatment claim involving sex stereotyping conflicts with the holdings of this Court or creates a conflict among the circuits. Second, the judgment below can be affirmed on other grounds. Third, all of the additional challenges Petitioner makes involve fact bound decisions of the lower courts, which do not address any important federal questions or in any other respect call for this Court to exercise its supervisory powers.

---

[3] The Complaint states:

> ¶ 22. Officer Barnes was demoted for two reasons. One reason was because he was a transsexual who did not fit the masculine stereotype his supervisors perceived sergeants should have. That is, the way in which Officer Barnes projected the sexual aspect of his personality did not conform to his supervisor's view of appropriate masculine behavior. Defendant's sexual stereotyping of plaintiff's non-masculine personality motivated its decision to place plaintiff in the field training program, to cause him to fail probation, and to demote him.
>
> ¶ 23. The second reason Officer Barnes was demoted is that defendant's supervisory officers were motivated by prejudice against male police officers who do not have a heterosexual sexual orientation.

Resp. App. 8-9.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989), WHICH HELD THAT EVIDENCE OF SEX STEREOTYPING CAN SUPPORT A CLAIM FOR SEX DISCRIMINATION, NOR IS THERE A CONFLICT AMONG THE CIRCUITS

A claim for sex discrimination under Title VII can properly lie when the claim is based on evidence of sex stereotyping. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion). *Price Waterhouse* has been consistently followed by the circuit courts in sex stereotyping cases for sixteen years without conflict. Even Judge Posner's concurring opinion in *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003), on which Petitioner relies to show a conflict, concedes that "the law as it has evolved" under *Price Waterhouse* consistently provides Title VII protection to victims of sex stereotyping. *Id.*

Contrary to the Petitioner's argument, *Price Waterhouse* did not create a new cause of action or establish a new form of discrimination. It merely held that evidence of stereotyping could be used as evidence that gender played a role in the employer's decision. *Id.* Subsequent to *Price Waterhouse*, this Court held that sex stereotyping in jury selection was discriminatory. *See J.E.B. v. Alabama*, 511 U.S. 127 (1994). "When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women." *Id.* at 140. This Court's precedent establishing that sex stereotyping is evidence of discrimination was properly followed in this case.

In *Price Waterhouse*, the plaintiff, Ann Hopkins, was denied partnership in an accounting firm because she did not meet the decision-makers' stereotype of a woman. Many partners were involved in the decision-making process and various reasons were given not to promote Ms. Hopkins, most based on a perception that she had deficient "interpersonal skills." 490 U.S. at 234-35. She was called "macho," "overcompensated for a woman," told to take a course at charm school, criticized for swearing, and told that her promotion chances would increase if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Supreme Court recognized that employee evaluations that are based on stereotypes associated with the employee's gender constitute prohibited discrimination. *Id.* at 251.

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of *disparate treatment of men* and women resulting from *sex stereotypes*."

Id. at 251, quoting *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (emphasis added). Thus, the Supreme Court made it clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.

The Circuits are in agreement that the holding of *Price Waterhouse* applies to men and women:

> [J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (citations to *Price Waterhouse* omitted). Thus, just as the woman in *Price Waterhouse* was denied a partnership because she was not sufficiently feminine for her employer, Philip Barnes, a male at the time of his probation, was denied his promotion because he was not sufficiently masculine enough for his supervisors. The Sixth Circuit's conclusion that Barnes's Title VII claim for sex discrimination could properly lie where the claim was based on "sexual stereotypes" (Pet. App. 18) is therefore entirely consistent with this Court's decision in *Price Waterhouse*.

In an effort to manufacture a conflict, the City sets up a straw man – arguing the Sixth Circuit allowed a Title VII claim for "intragender[4] discrimination based on sex stereotyping" (Pet. 7) – and then knocks it down by citing cases holding that there is no Title VII claim for being discriminated against on the basis of sexual orientation or being a transsexual. Pet. 8-9. The City relies on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (holding discrimination because of transsexualism is not

[4] Petitioner does not define this unique term.

protected by Title VII). Petitioner's reliance on *Ulane* is misplaced. The court in *Ulane* held that if the plaintiff had pleaded that she was discriminated against because of her sex (female), not transsexualism, she would have "clearly stated a cause of action under Title VII." *Id.* at 1087. Respondent does not contend that there is a Title VII cause of action for claims based on discrimination because of sexual orientation or transsexualism, which is why Respondent brought no such claims under Title VII. Petitioner may be confused by Barnes's equal protection claim, which alleged that he was treated differently, without rational basis, because of his perceived sexual orientation or gender identity. Resp. App. 9-10. But Barnes's *Title VII* claim was based on his status as a *male* who was treated differently because of his failure to conform to gender stereotypes, and there are no conflicts among the circuits regarding the application of *Price Waterhouse* to such claims.

The cases cited by Petitioner do not hold, as Petitioner would have this Court believe, that there is no cause of action for sex discrimination based on evidence of sex stereotyping. Each case cited by Petitioner recognized that sex stereotyping is a type of proof of a Title VII claim, but held that the evidence in that particular case did not support the claim. *See, Dawson v. Bumble & Bumble*, 398 F.3d 211, 222-23 (2d Cir. 2005) (affirming summary judgment for the employer because the lesbian employee produced "no evidence from which we may plausibly infer that her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any employment action at the hands of Bumble & Bumble"); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1064 (7th Cir. 2003) (holding that because the supervisor

called many men at the plant "girl scouts" this was insufficient evidence of sex stereotyping).

As noted above, Petitioner's reliance on Judge Posner's concurrence in *Weyauwega* is particularly unavailing. Judge Posner agreed that, under the current state of the law and this Court's decisions, evidence of sex stereotyping could support a claim for sex discrimination. Indeed, he acknowledged that the "logic" of *Price Waterhouse* is that if an employer disapproves of conduct by a man that it would not disapprove of in a woman, or conduct by a woman that it would not disapprove of in a man, the disapproval is "because of sex." *Id.* at 1067. This is exactly the proof Barnes submitted to the jury – that a high-ranking supervisor criticized him for not being masculine enough because he wore make-up, nail polish, and lipstick – all things women police officers were permitted to wear. Judge Posner's disagreement with the logic of this Court's opinions is not a valid basis for review by this Court of the lower courts' view that Barnes's evidence sufficed to make out a Title VII claim.

Various courts of appeals have followed *Price Waterhouse* and found sufficient evidence of sex stereotyping to support a sex discrimination claim. *See Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107 (2d Cir. 2004) (evidence of employer's stereotypical remarks that a mother of young children should not work was a form of gender discrimination); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (if "the harasser was acting to punish the victim's noncompliance with gender stereotypes," then there was liability); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 870 (9th Cir. 2001) (male co-workers accused the plaintiff of carrying his serving tray "like a woman"); *EEOC v. Joe's*

Stone Crab, Inc., 220 F. 3d 1263, 1284 (11th Cir. 2000) (deliberate and systemic exclusion of women food servers based on a sexual stereotype that "fine dining" was associated with male servers); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (relying on *Price Waterhouse* in non-employment case, holding that cross-dressing male loan applicant may prove claim under Equal Credit Opportunity Act that loan was denied because of sex if he can prove stereotyping caused the loan officer to send him home to change out of his dress); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir. 1999) (plaintiff properly stated a claim under Title VII where he alleged that the complaint was based in part on rumors that circulated labeling the plaintiff as homosexual in an attempt to "debase his masculinity"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (dismissing improperly pleaded claim that did not argue gender stereotype motivation, but leaving the door open to a Title VII cause of action for harassment based on sex stereotyping); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) (evidence that co-worker harassment was motivated by gender role stereotypes established that the harassment was because of sex), *vacated and remanded on other grounds for further consideration in light of Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) at 523 U.S. 1001 (1998); *Haynes v. W.C. Caye & Co.*, 52 F.3d 928 (11th Cir. 1995) (holding that remarks to women that they were too nice and not tough enough to handle debt collection violated Title VII).

No circuit has stated that it has any disagreement with *Price Waterhouse* or inability to follow it. The clear trend in the circuits is to follow *Price Waterhouse* and recognize that a Title VII claim for sex discrimination is

actionable when there is evidence of gender stereotyping. The Sixth Circuit's decision is fully consistent with that trend, and not in conflict with *Price Waterhouse* or any appellate decision since *Price Waterhouse*. Therefore, there is no conflict that requires this Court's attention.

II. THERE IS NO DISAGREEMENT AMONG THE COURTS THAT A TRANSSEXUAL MAY BRING A CLAIM FOR SEX DISCRIMINATION

In its second argument, the City contends that transsexuals do not have standing to bring a Title VII claim. This Court should reject this argument, as did the lower courts. Barnes may have been a transsexual, but he was also a male when the City discriminated against him. As a male, he has standing to bring a Title VII claim. Pet. App. 9-10, 13-14. The City cites no cases to support its argument, let alone a conflict among the circuits.

III. REVERSAL OF THE SIXTH CIRCUIT'S TITLE VII HOLDING WOULD NOT DISPOSE OF THIS CASE BECAUSE THERE IS AN ALTERNATIVE GROUND TO SUPPORT THE JUDGMENT

The jury found Barnes proved both his Title VII disparate treatment claim and his Equal Protection Clause discrimination claim. Pet. App. 79-80. Although the City appealed the equal protection jury instructions, the Sixth Circuit declined to review the equal protection issue, stating that "[a]s the City conceded at oral argument, however, we need not reach these challenges if we uphold the Title VII verdict. As a result, we will not address these arguments." Pet. App. 18. Even if this Court were to reverse the Sixth Circuit's affirmance of the district court's

Title VII judgment, the jury verdict for Barnes could be affirmed on alternative grounds under the Equal Protection Clause claim. For this reason as well, *certiorari* should be denied.

IV. THE REMAINING GROUNDS ARGUED BY THE CITY DO NOT IMPLICATE IMPORTANT FEDERAL QUESTIONS OR OTHERWISE PROVIDE A REASON FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWERS

Petitioner makes three additional arguments that are fact-bound and involve well settled principles of law: It asserts that the mixed motive jury instruction was erroneous (Pet. 12); that the Sixth Circuit did not follow Sixth Circuit case law regarding similarly situated employee proof (Pet. 15); and that the district court abused its discretion in awarding attorney fees (Pet. 16). None of these issues raise an important federal question.

The City argues that the jury should have been instructed on pretext and not mixed motive. The lower courts thought otherwise, and the City itself submitted a mixed motive instruction at trial. Whether the evidence supported such an instruction on the unique facts of this case is precisely the sort of fact-specific question that this Court regularly declines to grant certiorari to address. In any event, this Court's precedent amply supports a mixed motive instruction in this case. A plaintiff is entitled to some relief under Title VII once he establishes that sex was "a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2(m). A mixed motive case is one in which both legitimate and illegitimate (discriminatory) reasons combine to explain the adverse employment action. *Desert*

Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003). If the jury determines that sex discrimination was "a motivating factor" in the decision, the employers may nonetheless avoid paying damages if the employer establishes that the same adverse employment decision would have been made in the absence of the illegal sex discrimination. 42 U.S.C. §2000e-5(g)(2)(B).

The court properly instructed the jury in accordance with *Desert Palace*. Pet. App. 15-17. The City did not object at trial and even submitted its own mixed motive jury instruction which stated: "However, if you find that unlawful discrimination was a motivating factor in the City's employment decisions toward Plaintiff, you must return a verdict for Plaintiff." R. 59, p. 15, Apx. 145; Tr. 1163-1164, Apx. 665-666.[6] The City's proposed instruction was substantially similar to the one the court gave:

> Plaintiff must prove that her failure to conform to sex stereotypes was a motivating factor in Defendant's decision to demote Plaintiff. . . . Plaintiff's failure to conform to sex stereotypes was a "motivating factor" if it played a part in Defendant's decision to demote Plaintiff.

Tr. 1274, Apx. 700. Furthermore, the City did not object to the proposed instruction, stating:

> . . . frankly, I thought the wording was okay. . . . I only had a change that Plaintiff must prove that his sex was a motivating factor. . . . The rest I believe is accurate.

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[6] Reference to Apx. is to the joint appendix filed in the Sixth Circuit.

Tr. 1132-1133, Apx. 645-646; Tr. 1166, Apx. 668. When a party fails to object to a mixed motive instruction the issue is waived on appeal. *See Libbey-Owens-Ford Co. v. Insurance Co. of N. Am.*, 9 F.3d 422, 427 (6th Cir. 1993).

Next, the City argues the Sixth Circuit did not require, as part of the *prima facie* case, that Barnes prove he was treated differently than a similarly situated employee outside his protected class. Again, whether the evidence here made out a *prima facie* case is a quintessentially fact-bound issue. Moreover, as the Sixth Circuit properly held (and as this Court has repeatedly emphasized) evidence of a *prima facie* case is not the proper subject of an appeal once a case has gone to the jury. It is well settled law that the ultimate question is whether discrimination was shown by a preponderance of evidence, not whether the elements of a *prima facie* case have been met. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 n.3 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The Sixth Circuit followed its own precedent from *EEOC v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997) which stated:

> Not only should a district court decline to rule in that manner, we should not review the case for whether a *prima facie* case had been made, but rather, whether the ultimate issue of discriminatory retaliation falls in the favor of the Plaintiffs or Defendant.

Id. at 862. Therefore, whether Barnes made out a *prima facie* case is an irrelevant consideration at this stage.[6]

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[6] In any event, Barnes's evidence was more than sufficient to show, by comparison with the treatment of other employees (both male and

(Continued on following page)

Finally, the City argues that the Sixth Circuit "abused its discretion" in upholding Barnes's attorney fee award. The City makes no effort to identify any error in the Sixth Circuit's statement of the law governing attorney fees, and the claim of an abuse of discretion or similar "misapplication of a properly stated rule of law" is exactly the type of claim of error that this Court's Rules state is generally *not* a proper basis for a petition for certiorari. S. Ct. R. 10. In any event, the Sixth Circuit's opinion makes clear that the lower courts properly followed *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), which endorsed the 12 factors to be considered in assessing the reasonableness of an award of attorney's fees as set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The 12 factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of

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female) that he was discriminated against because he was viewed as lacking sufficient male characteristics to be a sergeant – a standard obviously not applied by the City to women. As the Sixth Circuit stated: "Barnes presented evidence he was the only police sergeant to fail probation between 1993 and 2000 and that the one other sergeant, who had lower probationary scores than Barnes was not a member of Barnes's protected class, passed probation." Pet. App. 10-11.

the professional relationship with the client; and (12) awards in similar cases.

Blanchard at 91 n.5. The Sixth Circuit's decision weighing each of these factors in this case is not in conflict with *Blanchard*, nor does it raise any important federal question.

CONCLUSION

For all the foregoing reasons, this case is not worthy of this Court's review and the Petition should be denied.

Dated: October 5, 2005

Respectfully submitted,

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EXHIBIT C

12.020 UNIFORMS, RELATED EQUIPMENT, AND PERSONAL GROOMING

Reference:

Standards Manual 1.3.9, 17.5.2, 22.2.7, 26.1.1, 26.1.3, 41.3.5, 41.3.6, 52.1.7, 53.1.1, 53.2.1, 61.3.2

Policy:

Sworn personnel will only wear uniforms and equipment issued or approved by the division.

Sworn personnel will maintain in good repair and have available a full police uniform and related equipment.

Uniformed personnel assigned to patrol duties will carry the PR-24 at all times.

Division personnel, whether on or off duty, will wear their badge or division issued ID (identification) card while in a police facility.

Division employees, on-duty, will be properly groomed and dressed, including authorized firearm, badge, and ID card. Division employees will wear either the uniform of the day (for their respective unit) or acceptable business attire of conservative color and design.

Procedure:

A. Calendar for the Uniform of the Day:

1. On May 16, uniformed personnel will begin wearing the summer cap, short sleeve shirt, and necktie.

a. Specialists/police officers whose primary function is to perform field duties, including all specialists/police officers assigned to a uniformed shift, are exempt from wearing the necktie.

2] Submit a renewal request every three months or for each recurrence.

3] Officers with an extensive, documented medical history of treatment for pseudofolliculitis barbae may submit requests for 12 month exemptions.

2. Grooming standards for female police officers:

a. Hair:

1) The hair, when worn full length, will not extend downward below the lower edge of the shirt collar.

2) Longer hair may be worn, but must be uplifted to the top of the head while in uniform. When in the uplifted position, no hair will extend downward below the lower edge of the shirt collar.

3) The length of the hair will not interfere with the proper wearing of the uniform cap.

4) Frontal grooming will not permit the hair to be visible on the forehead when the uniform cap is worn.

b. Makeup:

1) A moderate use of makeup is permissible.

a) The use of eye shadow is prohibited. The heavy use of makeup is not acceptable.

2) Fingernail polish, other than clear or neutral shades, is prohibited.

3. Jewelry:

a. The wearing of jewelry by male and female officers (chains, necklaces, pendants, earrings, bracelets, etc.) will be limited to rings and watches while in uniform.

1) Religious medals, scapulars, and other bona fide expressions of religious affiliations may be worn around the neck, provided the item is concealed by either the uniform shirt or an undershirt.

4. The above regulations apply to all uniformed and nonuniformed officers. Exceptions are officers who, because of the nature of their assignments, have the written permission of their bureau commander exempting them from these regulations.

a. The bureau commander will maintain a record of this exemption.

K. Identification of Civilian Employees:

1. Unit supervisors will ensure new civilian employees assigned to their unit respond to the Criminalistics Squad as soon as possible and have an ID name badge made.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PHILLIP W. BARNES **c/o LAUFMAN & GERHARDSTEIN** **617 VINE STREET #1409** **CINCINNATI, OH 45202** **PLAINTIFF**	:	**Case No.** **C-1-00-780** **J. Dlott**
vs.	:	**COMPLAINT**
CITY OF CINCINNATI **801 PLUM STREET** **CINCINNATI, OH 45202** **DEFENDANT**	:	(Filed Sep. 18, 2000)

I. PRELIMINARY STATEMENT

1. This is a civil rights action brought by a 19-year veteran of the City of Cincinnati Police Division who was demoted from the rank of sergeant because he is a transsexual who did not conform to typical heterosexual male stereotypes. Officer Phillip W. Barnes was promoted to sergeant in January 1999. Once he became a sergeant, Officer Barnes was singled out and forced to submit to a field training program. No other sergeant has been required to submit to such a program. After daily documentation of every action over five months, Officer Barnes was demoted for lack of "command presence." Officer Barnes was the only sergeant ever demoted in the Cincinnati Police Division. The City demoted Officer Barnes in violation of his right to be free from gender discrimination under Title VII and state law and his right to equal protection under the law as secured by the Fourteenth Amendment to the United States Constitution. Officer

Barnes seeks reinstatement to his rank of sergeant and an award of damages.

II. JURISDICTION

2. Jurisdiction of this court is invoked pursuant to 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1343 (3) and (4).

3. On April 11, 2000, Officer Barnes filed a charge, pursuant to Title VII, of employment discrimination based on gender with the U.S. Equal Employment Opportunity Commission. The EEOC issued a right to sue letter on June 21, 2000. A copy is attached as Exhibit A.

III. PARTIES

4. Plaintiff is a Police Officer with the City of Cincinnati Police Division. He resides in Hamilton County, Ohio. He is a transsexual male. During all relevant times he has been an employee of the City of Cincinnati. He is an employee within the meaning of Title VII and O.R.C. § 4112.01(A)(3).

5. Defendant City of Cincinnati is the employer of plaintiff and is a public employer within the meaning of Title VII and O.R.C. § 4112.01(A)(2).

IV. FACTUAL ALLEGATIONS

6. Phillip Barnes began his career as a police officer in 1981. He has received good evaluations while he has been a police officer.

7. Officer Barnes was a United States Marine, serving in Desert Storm in 1991 and has served in the

Marine reserves for thirteen years. Officer Barnes held the rank of sergeant in the U.S. Marine Corp for over 10 years. In honor of his service in Operation Desert Storm, The City of Cincinnati presented Officer Barnes with a key to the City.

8. He received his Bachelor of Science degree in criminal Justice in 1994 and his Master Degree in Social work in 1996. He went to school at night while he worked as a police officer during the day. In 1998, he received his license to practice social work form [sic] the Ohio Counselor and Social Worker Board.

9. On June 13, 1998, the Cincinnati Civil Service Commission held a promotional test for police sergeant. Plaintiff Officer Barnes placed number 18 out of approximately 150 officers who sat for the test.

10. Officer Barnes successfully completed 80 hours of New Sergeant Training at the Cincinnati Police Academy. He passed the examination and graduated from the training in the Fall of 1998.

11. On January 24, 1999, Officer Barnes was promoted to sergeant in the City of Cincinnati Police Division.

12. Officer Barnes was then transferred from District 5 to District 1 and put on the standard six months probation.

A. SPECIAL FIELD TRAINING PROGRAM

13. Officer Barnes was supervised while on probation much more intensely than any other probationary sergeant. Officer Barnes was the only sergeant to ever be required to submit to a special sergeant "field training" program. The "field training program" required a variety of supervisors to document Officer Barnes' performance on

a daily basis. During that program, he was under observation and evaluation at all times, including video and audio monitoring. No other sergeant has ever been subjected to such intense scrutiny.

14. The field training program was not validated as a supervision tool. It was designed to demoralize Officer Barnes, document all errors, no matter how slight, and force Officer Barnes into making errors so that there would be evidence to support discharge or demotion.

15. During the filed training program, Officer Barnes was not allowed to leave the District alone and at times was prohibited from operating the vehicle, radio, or the computer. His written reports were reviewed for every error, no matter how minute.

16. Officer Barnes was not evaluated as the other new sergeants are evaluated and by not so doing, defendant treated Officer Barnes differently than other probationary sergeants.

B. SEXUAL ORIENTATION AND GENDER DISCRIMINATION

17. It was widely known throughout the Police Division that Officer Barnes' sexual orientation was not heterosexual. He was perceived by members of the division to be bisexual, homosexual, transsexual, or a "cross dresser."

18. During the probationary period, several of Officer Barnes' supervisors and co-workers made comments about his sexual activities, appearance, grooming, and "command presence." These inappropriate statements referred to his pants being too tight, his underwear, his long fingernails, his arched eyebrows, whether he was

wearing painted fingernails, lipstick or face powder, and how he engaged in sexual acts.

19. On one occasion, a commander told Officer Barnes to cut his long nails and long hair and to look more masculine, even though Officer's Barnes' appearance conformed to the division dress code.

20. One of the sergeants that supervised Officer Barnes during field training made particularly offensive comments to plaintiff. These comments were sexually discriminatory and demeaning and were sexually stereotypical for a male police sergeant. This sergeant would ask Officer Barnes if he thought a person was a man or a woman, if he, the sergeant, were a pretty M – F – er. This sergeant also made offensive comments about anal sex. This sergeant would point men out on the street and ask Officer Barnes if he would "do him." This sergeant routinely evaluated Officer Barnes with low performance marks.

21. Another supervisory sergeant asked Officer Barnes, an African-American, if he would "do" a "white guy" or a specific police lieutenant.

22. Officer Barnes was demoted for two reasons. One reason was because he was a transsexual who did not fit the masculine stereotype his supervisors perceived sergeants should have. That is, the way in which Officer Barnes projected the sexual aspect of his personality did not conform to his supervisor's view of appropriate masculine behavior. Defendant's sexual stereotyping of plaintiffs non-masculine personality motivated its decision to place plaintiff in the field training program, to cause him to fail probation, and to demote him.

23. The second reason Officer Barnes was demoted is that defendant's supervisory officers were motivated by prejudice against male police officers who do not have a heterosexual sexual orientation.

24. The sexual comments and actions by supervisory officers were unwelcome and created a hostile work environment, making it impossible for Officer Barnes to do some of his job duties while he was on probation.

25. During all times relevant to the allegations in this case, the City of Cincinnati had a custom or policy of permitting discrimination against transsexuals, non-heterosexual male officers, and against male officers who were not stereotypically male.

C. THE DEMOTION

26. On June 16, 1999, Captain Vincent Demasi recommended that Officer Barnes fail probation as a sergeant due to the following alleged performance failures: Officer Barnes' inattention to grooming standards and his "lack of command presence." The Chief of Police approved the demotion on July 6, 1999.

27. On July 7, 1999, Officer Barnes was demoted to Police Officer. He was then transferred to another District. Officer Barnes is still currently assigned to this position. He has received favorable performance evaluations while in his current post.

28. Officer Barnes was the only sergeant in the Cincinnati Police Division to ever fail probation.

29. Defendants treated Officer Barnes differently than similarly situated heterosexual male officers by placing him

in an intensely scrutinizing field training program designed to find fault with his performance and by demoting him. Defendant's actions were motivated by intentional discrimination due to Officer Barnes being transsexual, his perceived sexual orientation, and by defendant's perception of Officer Barnes not being a stereotypical male.

30. At all times relevant to this action defendant's supervisory officers have acted consistent with and pursuant to city policy, custom and usage with respect to probationary supervision and demotion of Officer Barnes.

31. Officer Barnes is able to do the job as sergeant and seeks reinstatement to the rank of sergeant.

32. Defendant's supervisory officers' actions unreasonably interfered with plaintiff's work performance and created an intimidating, hostile, and offensive work environment.

33. As a direct and proximate result of the defendant's wrongful acts, plaintiff has suffered and will continue to suffer damages from humiliation, embarrassment, mental suffering, emotional injury, serious emotional distress, and demotion in rank and pay.

V. FIRST CAUSE OF ACTION – Title VII

34. Defendant has violated plaintiff's rights under Title VII, 42 U.S.C. §2000e *et seq*.

VI. SECOND CAUSE OF ACTION – § 1983/Equal Protection

35. Defendant has violated rights secured to the plaintiff under the equal protection clause of the 14th Amendment to the United States Constitution.

VII. THIRD CAUSE OF ACTION – Ohio Civil Rights Act § 4112.99

36. Defendant has discriminated against plaintiff in violation of O.R.C. § 4112.99.

VIII. CLAIM FOR RELIEF

WHEREFORE, plaintiff demands that the Court:

A. Award plaintiff compensatory damages in an amount to be shown at trial;

B. Reinstate plaintiff to position of sergeant in the City of Cincinnati Police Division;

C. Award plaintiff other equitable relief;

D. Award plaintiff reasonable attorney's fees, cost and disbursements;

E. Grant to plaintiff such additional relief as the Court deems just and proper.

Respectfully submitted,

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